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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE MAXINE M. CHESNEY, JUDGE

MARYLON BOYD, ET AL.,)
)
 Plaintiffs,)
)
 v.) NO. C 04-5459 MMC
)
 CITY AND COUNTY OF)
 SAN FRANCISCO, ET AL.,)
)
 Defendants.)
)

San Francisco, California
Thursday, July 12, 2007

TRANSCRIPT OF PROCEEDINGS

APPEARANCES :

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Reported By: BELLE BALL, CSR, RMR, CRR
Official Reporter

1 THURSDAY, JULY 12, 2007

2 9:06 A.M.

3 P R O C E E D I N G S

4 THE CLERK: All rise. This court is now in session,
5 the Honorable Maxine Chesney presiding. Please be seated.

6 THE COURT: All right, good morning. Mr. Cunningham,
7 you are appearing --

8 MR. CUNNINGHAM: Good morning, Your Honor.

9 THE COURT: -- for Mr. Galipo.

10 MR. CUNNINGHAM: I'm here for Mr. Galipo today, yes.
11 He's on trial, I guess, in Los Angeles.

12 THE COURT: Now, we had received some information
13 that -- I see Plaintiff's Counsel have deigned to appear.

14 MR. CUNNINGHAM: Defense.

15 THE COURT: Or Defendant's Counsel, rather. All
16 right, please come forward. I've called the case already.

17 UNIDENTIFIED MAN: I apologize --

18 THE COURT: Pardon me?

19 UNIDENTIFIED MAN: We were in the other courtroom.

20 THE COURT: You didn't receive a call?

21 UNIDENTIFIED MAN: No.

22 THE COURT: It was my understanding Ms. Lucero called
23 all Counsel. Oh, well, have a seat. Or, whoever's with you can
24 have a seat.

25 I'm just hearing now from Mr. Cunningham, as to why

1 Mr. Galipo isn't here. And, he's apparently in trial in Los
2 Angeles. We had received some information that he might be in
3 trial.

4 And, I believe that Ms. Lucero had advised him that if
5 he was, and if he was seeking in any way to change the time or
6 date of the hearing, that he would have to file some type of
7 motion for relief. We never received any motion.

8 So, --

9 **MR. CUNNINGHAM:** All I know, Judge, is I got a call
10 from Ms. Sarmiento yesterday. And, she asked me if I could
11 appear, and I said I would.

12 She said that Mr. Galipo had asked the Court to appear
13 by phone, but that didn't seem practical, apparently, on
14 something like this.

15 **THE COURT:** No, not at all. Not at a hearing of this
16 nature. In fact, I don't think I've ever actually conducted a
17 hearing by phone in a contested hearing.

18 **MR. CUNNINGHAM:** I don't see how you would do it.

19 **THE COURT:** But if I were going to do so, I don't
20 think it would be in a hearing such as this, where we would have
21 potential examination of a witness, on the matters.

22 **MR. CUNNINGHAM:** Uh-huh, uh-huh.

23 **THE COURT:** Now, I believe that the Defendant is ready
24 to proceed. Are you not?

25 **UNIDENTIFIED MAN:** Yes, Your Honor.

1 **THE COURT:** You have your witness here?

2 **UNIDENTIFIED MAN:** Yes, we do, Your Honor. Dr. Keram
3 is right there.

4 **THE COURT:** Well, it would be my intent to go forward
5 with the hearing.

6 **MR. CUNNINGHAM:** I'm willing to go, Judge. I've made
7 some study overnight of the materials. I was aware of the
8 motion.

9 As the Court knows, I've been kind of just an added
10 starter in this case, just kind of a backup, and I'm really not
11 expecting to participate much more.

12 But, just to hold up the Plaintiff's end today, I
13 could do that.

14 **THE COURT:** All right, well, you're apparently the
15 designated hitter.

16 **MR. CUNNINGHAM:** Yes.

17 **THE COURT:** All right.

18 **MR. CUNNINGHAM:** The pinch-hitter.

19 **THE COURT:** Very good, then. Well, we'll go ahead
20 with the hearing.

21 Now, just so that it's clear what we're about this
22 morning, at the initial pretrial conference, the Court heard
23 many motions in limine. And made many rulings.

24 In fact, I stayed pretty late, trying to get as many
25 rulings as possible for the parties, only to find -- on the hope

1 that they might be able to resolve the matter by settlement, if
2 they have the Court's rulings in place.

3 I understand there was essentially no settlement
4 conference, that Judge James, having been apprised of the
5 parties' positions, determined there was no value in conducting
6 a settlement conference, and didn't. So all that effort on the
7 Court's part to get the rulings in place was for naught.

8 In any event, we do have a number of rulings, but a
9 number of those rulings are -- are made contingent upon whether
10 the Defendant is allowed to pursue a defense of suicide by cop
11 in this case. And in particular, to pursue it in the manner in
12 which they seek to do so.

13 So, the proceedings today will -- will be essentially
14 a hearing as described in effect in *Daubert V. Merrell Dow*, to
15 determine whether it would be appropriate to submit this issue
16 to the jury.

17 And it appears to the Court that the linchpin of the
18 Defendants' defense in this regard is Dr. Keram, who is going to
19 be examined today --

20 **MR. CUNNINGHAM:** Uh-huh.

21 **THE COURT:** -- with respect to her views, as I felt
22 that her report and declaration, even combined, didn't fully
23 apprise the Court of the underpinnings of her opinion.

24 **MR. CUNNINGHAM:** Okay.

25 **THE COURT:** Okay. So, that's what we are going to

1 proceed with here, in this hearing, today. And then following
2 that particular inquiry, and whatever pertains to that issue,
3 the Court then intends to take up the few remaining procedural
4 matters relevant to the conduct of the trial in general that we
5 were unable to get to meaningfully at the last pretrial
6 conference because of time constraints.

7 **MR. CUNNINGHAM:** Uh-huh.

8 **THE COURT:** So. Okay. So, everyone then is ready to
9 proceed as outlined?

10 **MR. WIENER:** Yes, Your Honor. Scott Wiener. I'll
11 give you a card in a minute.

12 **THE COURT:** And you are appearing with?

13 **MR. WIENER:** Appearing for Defendants.

14 **THE COURT:** And along with --

15 **MR. LOEBS:** Blake Loeb, Your Honor.

16 **THE COURT:** All right, thank you. Now we have all
17 Counsels' appearances at this time.

18 And, it would seem to me as far as how we should
19 proceed in the conduct of the hearing, that the witness would be
20 called and sworn, then Mr. Wiener, you could examine the witness
21 to the extent you would feel appropriate, I would give
22 Mr. Cunningham an opportunity to ask some relevant questions.

23 The Court may well have questions of the witness as
24 well. I can let you know in advance the Court's chief concern
25 in this matter. All right. And, it's as follows.

1 It in all likelihood will be that the witness will
2 show without too much effort that there is a phenomenon
3 recognized in the psychiatric and other communities sometimes
4 described as suicide by cop. In other words, there are people
5 out there who wish to end their life, and have found that
6 confrontation with police, provoking a shooting, is one way to
7 do it.

8 All right. The issue will be the application of that
9 particular concept to the particular facts of our case, which
10 may not actually meet what I'd call a classic example of suicide
11 by cop. So, that's the focus of the Court's inquiry.

12 All right. Do you want to call your witness?

13 **MR. WIENER:** Yes, Your Honor. The defense calls
14 Dr. Emily Keram.

15 **THE COURT:** All right. And, Doctor, if you will just
16 come up to the witness stand. Before you are seated, the clerk
17 will swear you in. I think -- well, right over here is easier.

18 **THE WITNESS:** My file is here.

19 **THE COURT:** Oh, all right. Fine. If you would like
20 to bring that over there with you, you may do that as well.

21 (Witness placed under oath)

22 **THE CLERK:** Please be seated. State your full name
23 for the Record, and spell your last name, please.

24 **THE WITNESS:** My name is Emily Alyssa -- A-L-Y-S-S-A
25 -- Keram. K-E-R-A-M. M.D.

KERAM - DIRECT EXAMINATION / WIENER

1 **EMILY ALYSSA KERAM, M.D.,**

2 **called as a witness for the DEFENDANTS,**

3 **having been duly sworn, testified as follows:**

4 **DIRECT EXAMINATION**

5 **BY MR. WIENER:**

6 **Q** Good morning, Dr. Keram.

7 **A** Good morning.

8 **Q** Dr. Keram, what do you do for a living?

9 **A** I'm a psychiatrist.

10 **Q** And can you describe your educational background to become
11 a psychiatrist?

12 **A** Completed my undergraduate degree at Duke University with a
13 bachelor of science in zoology in 1981. I graduated from the
14 University of North Carolina, Chapel Hill, School of Medicine
15 with a medical degree, in 1988.

16 I completed a training, a psychiatric residency training at
17 the University of North Carolina School of Medicine, in 1992.
18 In the last year of my residency, I completed a fellowship in
19 forensic psychiatry with the United States Department of
20 Justice.

21 So, I finished that in June of 1992, as well.

22 **Q** And what is a fellowship of forensic psychiatry?

23 **A** It's a year-long course, the curriculum of which is set out
24 by our standardization board, where people who have an interest
25 in larger to be forensic psychiatrists evaluate criminal and

1 civil cases attend classes at a law school, and also didactic
2 curriculum within the fellowship program, itself, across the
3 spectrum of material that a forensic psychiatrist might
4 encounter in a forensic practice.

5 **Q** And when you refer to forensic psychiatry, can you just
6 describe what you are referring to?

7 **A** Forensic psychiatry involves working in any issue, any
8 mental health issue that arises in a legal context. So it's
9 actually a fairly broad field.

10 **Q** And does it involve sort of looking backward to review what
11 happened and analyzing it?

12 **A** Yes.

13 **Q** Okay?

14 **A** That scenario arises within a variety of contexts within
15 forensic psychiatry.

16 **Q** And are you board-certified as a psychiatrist?

17 **A** Yes, I'm board-certified in psychiatry neurology, which is
18 our general board certification. I'm also certified in forensic
19 psychiatry.

20 **Q** And, are you licensed as a medical doctor in the State of
21 California?

22 **A** Yes, I am.

23 **Q** Okay. And when did you receive your license?

24 **A** I think I got my California license in either 1990 or 1991;
25 I'm not sure when. I would have to look at my CV.

1 **Q** And when did you receive your board certification in
2 psychiatry and neurology?

3 **A** I believe that was in 1993 or '94.

4 **Q** Okay.

5 **A** I'm sorry, I don't have a copy of my CV with me.

6 **Q** And if you need to refer to a document just let us know?

7 **A** Okay.

8 **Q** Can you just give the Court an overview of your practice as
9 a psychiatrist since you became board-certified?

10 **A** Initially I was in private practice full-time and the
11 majority of my work was treating patients. I did some criminal
12 and civil forensic work in addition to my clinical work.

13 In 1996, I left my private practice to become the clinical
14 director of a VA clinic that was opening in Santa Rosa,
15 California, where I live. And, at that time, the VA didn't
16 allow their doctors to practice outside of the VA, so I limited
17 my work then to full-time work at the VA.

18 The majority of my work at the VA was clinical care, seeing
19 patients but about 25 percent of my time was devoted to
20 administrative duties, getting the clinic set up and then
21 running the clinic. At some point during the time I was there
22 from '96 to 2000, the federal law changed and we were allowed to
23 do some forensic work -- well, work outside of the VA. So, I
24 again started to do criminal and civil cases.

25 And then, in 2000, I was recruited to join the full-time

1 paid faculty at UCSF where they were starting a fellowship
2 program in forensic psychiatry identical to the one that I had
3 done in North Carolina. And so, I was a full-time faculty
4 member there for four years. During that time, I continued to
5 do civil and criminal litigation.

6 I also broadened my expertise in law enforcement-related
7 contacts with mentally-ill citizens by developing training
8 curricula, and then actually doing training for law enforcement
9 agencies, and I served on a POST committee that developed
10 curricula at that time.

11 I continued to see patients while I was in the University,
12 a full-time university faculty member. I worked on the
13 inpatient unit, also.

14 In May of 2004, I decided to leave the full-time faculty
15 because the commute was really wearing me down. So I kept a
16 faculty affiliation, and I still teach some in the fellowship
17 program, but I went back to the VA half time, treating patients.
18 And, continued to do forensic work in the other half of my time,
19 and also to see patients in my own private practice.

20 The majority of the patients that I see in my private
21 practice are law enforcement officers, which was a new area for
22 me, that I took on, as a result of the trainings that I had
23 done, law enforcement officers started to refer themselves to me
24 for treatment.

25 Q So you are currently seeing patients in a private practice

1 and at the Vet Administration Hospital?

2 **A** Correct.

3 **Q** And you are still teaching?

4 **A** Yes.

5 **Q** And that is at UCSF?

6 **A** Yes.

7 **Q** Have you supervised other psychiatrists in your career?

8 **A** Yes. When I -- in addition to supervising the forensic
9 psychiatry fellows. That also included medical students and
10 residents who would rotate with us. During the four years that
11 I ran the VA clinic, I supervised all of the psychiatrists that
12 worked there.

13 And, I'm currently in the process of perhaps again becoming
14 the clinical director at that clinic, because that is a job that
15 we just haven't been able to fill consistently since the time
16 that I left. And then I'll take on the supervision of the
17 clinicians there, as well, again.

18 **Q** Now, you mentioned before that you have provided trainings
19 outside of the UCSF context. Can you just describe the
20 psychiatric-related trainings that you have provided, just an
21 overview?

22 **A** To, to other psychiatrists? Or to law enforcement?

23 **Q** Let's start with law enforcement first.

24 **A** Okay. I provide a quarterly training in the San Francisco
25 Police Department's crisis intervention training program.

1 That's a week-long program that officers volunteer to attend,
2 that emphasizes law enforcement contacts with mentally-ill
3 citizens. And I teach almost the entire first day. So, I do
4 that quarterly.

5 I'm also invited, from -- by other law enforcement
6 agencies, to teach in their -- either their ongoing POST
7 certifications or their academies. So, I have taught in the Son
8 Jose CIT, the Crisis Intervention Training academy. I've taught
9 in Sonoma County, taught at the FBI academy.

10 I'm trying to think. Then, I volunteer with an
11 organization called West Coast Post-Trauma Retreat, where we
12 provide a one-week residential educational program for law
13 enforcement officers and other first responders who have had a
14 critical incident. And I come in and teach about PTSD and
15 treatment for PTSD and first responders.

16 **Q** Okay. And, how about the trainings you provide to other
17 psychiatrists outside of the UCSF complex?

18 **A** I'm a member of the American Academy of Psychiatry and the
19 Law, and I've chaired three committees of that organization.
20 And I currently chair the law enforcement liaison committee. I
21 regularly submit to make presentations at the annual meeting
22 that we hold in October each year.

23 And, I have presented on a variety of law
24 enforcement-related issues there. Everything from how to
25 conduct a psychological autopsy and suicide by cop to how to

1 design a training curriculum for law enforcement officers
2 regarding their contacts with mentally-ill citizens.

3 **Q** And, have you served on any POST, POST committees?

4 **A** Yes.

5 **Q** Ask you to describe --

6 **A** As I mentioned, it was either in 2000 or 2001, somewhere in
7 that time, I was appointed to a POST committee that was
8 established by the California Legislature called the MDD
9 Committee, a mentally- and developmentally-disabled committee.

10 Our committee was charged with developing a curriculum that
11 we would then make -- POST would then make available to every
12 law enforcement agency in California, and other agencies as
13 well, regarding law enforcement contacts with mentally ill
14 citizens and developmentally disabled citizens.

15 **Q** And what does POST stand for?

16 **A** It's the a California Commission on Peace -- excuse me,
17 Peace Officer Standards and Training.

18 **Q** Okay. Now, I want to ask you some questions about your
19 background relating to what we have been referring to as suicide
20 by cop.

21 **A** Uh-huh.

22 **Q** Do you have experience in this area?

23 **A** Yes, I do.

24 **Q** And have you treated patients who have contemplated or
25 talked to you about a desire to commit suicide by cop?

1 **A** Yes, I have. In fact, one of my patients actually
2 initiated a suicide by cop, but fortunately it wasn't successful
3 in provoking lethal force. He was hit with a less lethal round,
4 which brought the incident to an end.

5 **THE COURT:** You didn't hear the witness?

6 (Off-the-Record discussion)

7 **BY MR. WIENER:**

8 **Q** You might want to place the mic like an inch or two closer
9 to your mouth.

10 And, have you -- have you treated suicidal patients
11 generally, including patients -- suicidal patients unrelated to
12 suicide by cop?

13 **A** Yes.

14 **Q** Can you estimate how many suicidal patients you have
15 treated over the years?

16 **A** That would be very difficult. I think at the VA, all
17 together, you know, I've seen close to about 700 patients. The
18 majority of which are combat trauma PTSD veterans, the majority
19 of which now are -- all throughout the time I have been at the
20 VA have been Vietnam vets.

21 And unfortunately, they have a very high incidence of
22 suicidal ideation, and some of them go on to develop an intent
23 and a plan. So, I would -- and of course, in my private
24 practice I saw suicidal patients as well, and suicidal patients
25 with a variety of diagnoses. So it's been hundreds of suicidal

1 patients over the course of my career.

2 **Q** Okay. And can you -- have you written any publications
3 related to suicide by cop?

4 **A** Yes, I have.

5 **Q** How many?

6 **A** I've written one publication that was published in the
7 general literature on suicide by cop and then the training
8 curricula that I've written involves also a curricula on suicide
9 by cop.

10 **Q** And have you provided trainings to anyone, police officers
11 or otherwise, relating to suicide by cop?

12 **A** Yes. I have.

13 **Q** Can you please describe that?

14 **A** The first time that I presented to a law enforcement
15 audience on the topic of suicide by cop was at the FBI academy,
16 where I presented my paper on suicide by cop at a conference
17 that they were holding on suicide and law enforcement. That was
18 in, I believe, 1999 or 2000.

19 And then, the quarterly training that I give at the
20 San Francisco Police Department's crisis intervention training
21 involves a lecture on suicide by cop each quarter, and I think
22 we have been doing that training for approximately five or six
23 years now.

24 I've given lectures on suicide by cop to the San Jose
25 Police Department, CIT Academy, and also to law enforcement

1 agencies in Sonoma County.

2 **Q** Are you familiar with the literature, the professional
3 literature relating to suicide by cop?

4 **A** Yes, I am.

5 **Q** And you have reviewed that literature?

6 **A** Yes, I have.

7 **Q** And are you familiar with the -- with peer-reviewed studies
8 that have been conducted relating to suicide by cop?

9 **A** Yes, I am.

10 **Q** So let's talk about what suicide by cop is.

11 **MR. WIENER:** And Your Honor, at any point if I'm going
12 into an area that Your Honor doesn't need to hear about, or
13 that's already been adequately covered elsewhere, if Your Honor
14 would just let me know --

15 **THE COURT:** Well, I would say that you probably do not
16 have to conduct an examination of the length that you might
17 conduct if someone were hearing about this for the very first
18 time.

19 In the same light, as I say, I am interested in the
20 application of the concept to this particular event, and in
21 detail. So, to the extent that when you are inquiring of
22 Dr. Keram about background information, if it's relevant to what
23 you are going to be inquiring into on the more specific issue,
24 then that's fine. I'm not trying to cut you off here.

25 And I appreciate, though, the question, because

1 obviously you don't want to take more time than you need on a
2 particular point. Your last question was what, again?

3 **MR. WIENER:** I was about to go into the general
4 phenomenon of suicide by cop.

5 **THE COURT:** That's fine. We may as well hear some of
6 that at this point, just to lay the foundation.

7 **MR. WIENER:** Okay. And I would just note for the
8 Record that Dr. Keram's report and the declaration, which do
9 contain a fair amount of background on suicide by cop, are a
10 part of the Record, as well as her CV, in terms of our
11 oppositions.

12 **THE COURT:** All right. I will consider those as part
13 of the totality of the Record.

14 **MR. WIENER:** Okay, great. Thank you, Your Honor.

15 **THE WITNESS:** Mr. Wiener?

16 **MR. WIENER:** Yeah.

17 **THE WITNESS:** There's one area in which I've worked
18 regarding suicide by cop that is not reflected on my CV, which I
19 would like to mention.

20 **BY MR. WIENER:**

21 **Q** Would you please mention that.

22 **A** I participated as the principal investigator on a study of
23 suicide by cop that we conducted in -- I think it was 2003, in
24 our psychiatry and law program at UCSF. That study, although we
25 presented the data at the American Academy of Psychiatry and the

1 Law, was never published.

2 We encourage our fellows each year, we require them
3 actually to do a research project, and then to write a paper for
4 it. The Fellow who did that particular project hasn't finished
5 the paper yet on it, although we -- she and I did present the
6 data at the annual meeting of the American Academy of Psychiatry
7 and the Law. In order to present there, the submissions that
8 are made for presentation do undergo peer review.

9 **Q** Okay, great.

10 **A** And may I -- may I also interrupt for just one minute?

11 **Q** Of course.

12 **A** Would it be possible for me to get a glass of water?

13 **MR. WIENER:** Yes. I should have offered.

14 **THE COURT:** We're not in our regular courtroom, so the
15 amenities might not be quite up to snuff here.

16 All right so that was the one addition that you wanted
17 to place in the Record.

18 **MR. WIENER:** Okay, thank you Your Honor.

19 **THE COURT:** Okay.

20 **BY MR. WIENER:**

21 **Q** Dr. Keram -- so, you are drinking.

22 What is suicide by cop?

23 **A** Different definitions for suicide by cop exist, depending
24 on the area in which it's described. The POST definition for
25 suicide by cop is an incident in which an individual poses the

1 risk of serious harm or death in order to intentionally provoke
2 the use of lethal force by law enforcement officers.

3 **Q** And how long has suicide by cop been recognized -- or, I
4 should rephrase that. Is suicide by cop a recognized phenomenon
5 in the psychiatric field?

6 **A** Yes, it is.

7 **Q** And for how long has it been a recognized phenomenon in the
8 psychiatric field?

9 **A** Are you asking when the first cases of suicide by cop,
10 looking back, may have occurred, as described? Or when people
11 actually started calling it suicide by cop, and writing
12 literature on suicide by cop?

13 **Q** Let's start with when the psychiatric field began to
14 recognize the phenomenon and study it.

15 **A** There was a paper published, I believe, in the late
16 Fifties, called Victim-Precipitated Homicide, which described
17 the phenomena of somebody dying intentionally, suicide at the
18 hands of another. That was the first time in the scientific
19 literature that that concept arose.

20 The application of victim-precipitated homicide to law
21 enforcement interactions was formally described as suicide by
22 cop in approximately 1984. And, you start to see papers
23 published in both the scientific literature and the law
24 enforcement literature in the Nineties through to today.

25 **Q** Okay. And, when is -- has anyone that you are aware of

1 gone back and looked historically to see how early they can find
2 examples of suicide by cop?

3 **A** Yeah. The -- many of the studies were retrospective
4 analysis. And actually, in my own preparation for authoring or
5 co-authoring practice guidelines for the conduct of insanity
6 defense evaluations, I found a very early case of suicide by
7 cop, dating back to 1798.

8 **Q** And, I believe that's described in your declaration.

9 **A** Okay.

10 **Q** Now, how many, if you can estimate, how many peer-reviewed
11 articles have been written relating to suicide by cop?

12 **A** In the medical literature, there are approximately ten.
13 There are chapters in books which are not peer-reviewed, per se,
14 but are written by people who have been -- who have published
15 literature that has been peer-reviewed.

16 **Q** Can you estimate how many non-peer-reviewed publications
17 relating to suicide by cop exist?

18 **A** I know of approximately four.

19 **Q** And, have there been studies, scientific studies performed
20 relating to suicide by cop?

21 **A** Yes.

22 **Q** And, I'm referring to peer-reviewed studies.

23 **A** Yes.

24 **Q** And, can you estimate how many?

25 **A** If you'll will wait for just a minute, I'll take my papers

1 out on suicide by cop, and look at the ones that were -- where
2 they actually reviewed cases.

3 **Q** Yes.

4 **THE COURT:** All right.

5 **THE WITNESS:** And, of course, the research that we
6 did, while not being peer-reviewed for submission, was reviewed
7 by our research committee within the fellowship program.

8 **THE COURT:** If I could ask, for clarification
9 purposes, when you say "studies," what would that entail in this
10 particular type of field? A study on suicide by cop?

11 **THE WITNESS:** Yeah. I appreciate the question.
12 Because obviously, when people write about suicide by cop they
13 may be studying different parts of the phenomena. So --

14 **THE COURT:** Are they collecting data?

15 **THE WITNESS:** Yeah.

16 **THE COURT:** In other words, sometimes you think of a
17 study as an experiment. This is not an experiment.

18 **THE WITNESS:** No, no. No, we don't want a control
19 group that we don't shoot at and a study group that we do.

20 **THE COURT:** Right. Well, the nature of the study
21 would be what, then? What are people doing in these studies?

22 **THE WITNESS:** Probably the best way for me to
23 demonstrate that is to go through the studies that I brought,
24 very briefly.

25 **THE COURT:** Okay.

1 **THE WITNESS:** The largest study that's been published
2 to date on suicide by cop is a paper that was published in 1998,
3 called Suicide By Cop. And the first author is Hutson,
4 H-U-T-S-O-N.

5 What the researchers did was go to the largest law
6 enforcement agency in the United States, which is Los Angeles
7 County Sheriff's Office, and look at ten years of
8 officer-involved shootings, from 1987 to 1997. And, over that
9 period of time, there were, I believe, approximately -- between
10 440 and -- 430 and 440 shootings.

11 They were interested in developing what we call
12 selection criteria, which is way of defining a subpopulation of
13 a population of people who had committed so sides by cop and
14 then looking at those incidents and those individuals to see
15 what they could learn about them.

16 **THE COURT:** Did they start with the presumption that
17 the particular shooting had been intentionally provoked as a
18 suicide by the decedent, and then went back and looked at their
19 history?

20 **THE WITNESS:** That's an excellent question. And every
21 researcher who wants to do this type of analysis has to answer
22 that question satisfactorily for peer review.

23 What the researchers in this study did was take those
24 437-odd shootings, and apply a definition of suicide by cop that
25 was very, very strict. Very strict. Much -- well, not "much,"

1 but it's hard to quantify these things. More strict than the
2 POST definition.

3 So that they could take out a subset of people that
4 they felt were confident -- who they felt confidently
5 represented people who were committing a suicide by cop. And if
6 you like, I can tell you what their definition or requirements
7 were.

8 **THE COURT:** Yeah, that would be good.

9 **THE WITNESS:** Okay. I'm, sorry but I haven't gotten
10 bifocals yet, so I'm going to be taking my glasses on and off.

11 **THE COURT:** Walgreen's will do it.

12 **THE WITNESS:** Thank you. Okay. (As read) "To be
13 included in the study as suicide by cops, all cases met the
14 following criteria: One, evidence of suicidal intent; two,
15 evidence the individuals specifically wanted officers to shoot
16 them; three, evidence they all possessed a lethal weapon or what
17 appeared to be a lethal weapon; and four, evidence they
18 intentionally escalated the encounter, and provoked officers to
19 shoot them in self-defense, or to protect civilians."

20 And then the authors expand on what they meant by each
21 of those four factors.

22 **THE COURT:** All right. Evidence of suicidal intent,
23 evidence that the officers specifically -- what was that? The
24 second one?

25 **THE WITNESS:** Specifically wanted officers to shoot

1 them.

2 **THE COURT:** Okay. And, then the decedent had a lethal
3 weapon, and intentionally escalated the encounter?

4 **THE WITNESS:** Or what appeared to be a lethal weapon.

5 **THE COURT:** Okay.

6 **THE WITNESS:** And that's important.

7 **THE COURT:** All right. So, they could have a fake
8 gun.

9 **THE WITNESS:** Right, exactly. Yeah.

10 **THE COURT:** And that they intentionally escalated.

11 **THE WITNESS:** Correct.

12 **THE COURT:** Now, going back to your POST definition,
13 the definition that you gave for POST is essentially "An
14 incident where an individual poses a risk of death in order to
15 provoke lethal force by the officers."

16 What you're describing here for the deceptive is not
17 so much, as I understand it, a difference in the definition, but
18 rather, the evidence that someone considered sufficient to
19 support a finding that that definition had been met.

20 In other words, what evidence would have to be
21 available before someone could draw the conclusion that someone
22 had provoked the police in order to shoot them.

23 **THE WITNESS:** I'm going to respond to your concern --
24 which I think is a very valid one -- with my researcher hat on.

25 **THE COURT:** Okay.

1 **THE WITNESS:** Researchers will set an extremely high
2 threshold for selection criteria, even if it means that some
3 cases that actually do meet what we are looking for may be
4 excluded, because we want to maximize the number of cases that
5 are -- that we feel to, as close to 100 percent as we can, are
6 going to be the population that we want to study.

7 **THE COURT:** I think the difference -- what I'm just
8 trying to clarify here is if -- if someone said, "What is
9 suicide by cop," you would say "Somebody wanted the police to
10 kill them." Okay. Essentially.

11 How do you know that is the -- is what, it seems to
12 me, the study was -- was using? In other words, if someone just
13 said, "Well, I think that's what someone was doing," that would
14 count as sufficient evidence to meet the definition of suicide
15 by cop for this study. This study was requiring certain indicia
16 of that.

17 **THE WITNESS:** Uh-huh.

18 **THE COURT:** It just seemed to me that one's a
19 definition and one is a group of factors from which one draws a
20 conclusion that somebody was trying to get themselves killed.

21 **THE WITNESS:** I understand. And I think that the
22 difference -- the different definitions arise because of the
23 different functions that they serve. For example --

24 **THE COURT:** No, that's not my question. Okay. I may
25 be wrong on this. It just sounds like we're not talking about

1 definitions. All right?

2 We are talking in one -- in other words, you said
3 there are different definitions. Maybe this is the word that
4 people use in your field. To me, one sounds like a dictionary
5 definition, and the other sounds like how you then prove it up.
6 All right? You prove it up because somebody had X, Y, Z.

7 But what you are saying is in order to -- maybe you're
8 simply divining suicide by cop in this study, by the events that
9 have been ticked off. The evidence.

10 **THE WITNESS:** Okay. You are making an absolutely
11 excellent point, and I really appreciate your clarification,
12 because I think I under -- I think I misunderstood what you
13 meant, and I now understand.

14 Okay. I think most psychiatrists would call these
15 four factors selection criteria, and not definition.

16 **THE COURT:** Right, but I thought you called it a
17 definition. I missed your testimony, then. You're calling it
18 selection criteria.

19 **THE WITNESS:** Correct, correct.

20 **THE COURT:** Okay.

21 **THE WITNESS:** Yeah. I think I was using "definition"
22 in a very loose, loose way. So I will call it "selection
23 criteria."

24 **THE COURT:** That's what threw me off. It may be that
25 you just used the used the word to define selection criteria, or

1 something like that, and that caused me to think that this was
2 one of the different definitions. Because earlier, you had said
3 there's different definitions for SBC. I was going to come back
4 and ask you what those were. And, I understood you to be giving
5 me one. But actually, they're taking -- were they taking the
6 POST definition, and then using this selection criteria?

7 **THE WITNESS:** No. This paper predated the POST
8 definitions.

9 **THE COURT:** Okay. So they're just -- they are taking
10 this evidence. All right. If it's present, then somebody got
11 into the study as being someone who had committed essentially
12 what you're calling suicide by cop, all right.

13 And now they are going to look at the factors that led
14 up to it? Or what?

15 **THE WITNESS:** They looked at a variety of different
16 factors in the study. They looked at --

17 **THE COURT:** For what purpose? They have already now
18 defined the group.

19 **THE WITNESS:** Right.

20 **THE COURT:** So, for what purpose were they looking at
21 the factors?

22 **THE WITNESS:** Their purpose was to -- I think all of
23 our purposes, who study this area, is to see whether or not we
24 can identify anything that will help family members, community
25 members, clinicians, and law enforcement officers to identify

1 these potential cases earlier --

2 **THE COURT:** Before the event.

3 **THE WITNESS:** Correct. And to offer assistance to
4 those different parties about how they might manage them, across
5 that spectrum, from families to friends to clinicians to law
6 enforcement officers.

7 **THE COURT:** Well, what I would like to do is take the
8 criteria -- are these selection criteria that you accept as
9 valid selection criteria to put someone in the suicide by cop
10 category?

11 **THE WITNESS:** I think that -- I think that if somebody
12 meets those four criteria, that they are almost certainly a
13 suicide by cop. I don't know that I would have chosen those
14 exact selection criteria.

15 **THE COURT:** Okay. Well, this really -- and why I'm
16 focusing on this is the crux of the question I have with respect
17 to our case.

18 In other words, you've set out criteria, evidence of
19 suicidal intent. And I assume that is either -- something that
20 is separate and distinct from the event, itself? Or not?

21 **THE WITNESS:** It can be. And different researchers
22 will approach that differently. Some will look at the presence
23 of risk factors for suicide outside of the event.

24 **THE COURT:** But we're talking about suicidal intent,
25 like one could be a note that somebody found later. It could be

1 that in counseling, somebody said "I really feel like I want to
2 kill myself," or something like that.

3 **THE WITNESS:** Absolutely. But many people who suicide
4 don't make direct expressions. So you also have to be aware of
5 risk factors that are present.

6 **THE COURT:** Yeah, but we are talking evidence.
7 Evidence of suicidal intent.

8 **THE WITNESS:** Risk factors are evidence.

9 **THE COURT:** Okay. That's one. Two is evidence that
10 they specifically wanted the officer to shoot them.

11 **THE WITNESS:** Correct.

12 **THE COURT:** Three, the person had a lethal weapon, or
13 appeared to have one.

14 **THE WITNESS:** Uh-huh.

15 **THE COURT:** And four, that they intentionally
16 escalated the encounter. My question is if you take those
17 factors, you apply them to what you know about our case, do they
18 match up?

19 **THE WITNESS:** My opinion, they do.

20 **THE COURT:** All right. That's what I want to hear
21 about. Because at first blush, it doesn't seem like that to me.

22 **MR. WIENER:** All right. Shall I get directly to that,
23 Your Honor?

24 **THE COURT:** Start with that, and then go back if you
25 need to. I'm not saying they are all missing, but at least at

1 first blush it doesn't look like we have evidence of suicidal
2 intent, that the person specifically wanted the person to -- the
3 officers to shoot them -- well, you have the reaching, possibly,
4 and the intentional escalation, maybe, so those are the things
5 that I would like to see if they -- how the witness matches
6 those.

7 **MR. WIENER:** Sure.

8 **THE COURT:** Because otherwise we are starting to stray
9 from what appears to be at least a legitimate definition of
10 suicide by cop.

11 **MR. WIENER:** Okay.

12 **BY MR. WIENER:**

13 **Q** Dr. Keram, let's focus on those four elements. Let's start
14 with the first one, evidence of suicidal intent.

15 Now, you indicated before that that can be -- that kind of
16 evidence can be taken from things that happened before.

17 **A** Correct.

18 **Q** Can you infer or gather evidence of suicidal intent from
19 the actions of the person at issue during the encounter with the
20 police?

21 **A** Yes. But I believe they actually started earlier than that
22 particular encounter.

23 **Q** Okay. In this case, but as a general matter, can you infer
24 that intent, as a scientist, from the actual encounter with the
25 police?

1 **A** Yes.

2 **Q** Do you believe, based on your review of the record in this
3 case, that Cammerin Boyd met this first criteria, evidence of
4 suicidal intent?

5 **A** Yes.

6 **Q** Can you please explain why you believe that.

7 (Witness examines document)

8 **A** I tend to think chronologically. The combination of his
9 behavior in the manner in which he came to law enforcement
10 attention, and then firing twice at law enforcement officers is
11 indicative of suicidal intent. The statement that he made at
12 the scene that were heard both by -- I believe it was Officer
13 Elieff and the witness named Campos, where he said "You can just
14 shoot me now" or something to that effect is evidence of
15 suicidal intent.

16 His behavior in being noncompliant with law enforcement
17 commands while law enforcement officers had their weapons drawn
18 and pointed at him, and were shouting commands at him, that
19 non-compliance is evidence of suicidal intent. And then, his
20 actions in reaching into the car, not once but twice, are also
21 evidence of suicidal intent. And I want to emphasize that my
22 basis for saying that those things are evidence of suicidal
23 intent is based on my review of forensic cases that had been
24 referred to me, and other reviews of other cases that were
25 suicide by cops.

1 **Q** And how about the Oakland incident from three days before?
2 Did that give any indication of suicidal intent?

3 **A** Yes, it did. At that incident, he also told law
4 enforcement officers to shoot him.

5 **THE COURT:** Just so I can clarify, when did Mr. Boyd,
6 according to the police, tell the San Francisco officers that
7 they could shoot him? When did that occur?

8 **MR. WIENER:** It was when he first arrived on Larch
9 Way, if I'm not mistaken. Mr. Loeb's can --

10 **MR. LOEB'S:** It was while he was in Larch Way, after he
11 was out -- according to Joe Campos, who had a view from the
12 third floor, he heard Mr. Boyd say that -- "You can shoot me,
13 shoot me if you want" or something -- I don't have the quote
14 right here. And Officer Elieff heard a similar comment.

15 **THE COURT:** While he had his hands up?

16 **MR. LOEB'S:** Right now I can't recall whether he -- the
17 testimony is that he had his hands up at the time. His hands
18 were up and down a few times during the interaction.

19 I can't recall whether it was while he had his hands
20 up.

21 **THE COURT:** I actually don't remember that part about
22 him -- I remember the Oakland incident, and the challenge,
23 essentially, described in that event.

24 I didn't remember that there was one in the
25 San Francisco -- there may well have been, I'm not suggesting

1 there wasn't. I was just asking if someone to refresh my memory
2 about when it happened, because I don't have that really clear.

3 **MR. LOEBS:** I'm, you know, 100-percent confident that
4 Joe Campos, the fact witness in this case, had testified in both
5 his interview with the police and in his deposition testimony,
6 that Mr. Boyd said that during this incident, on Larch Way.

7 **THE WITNESS:** And, may I say something about that,
8 Your Honor?

9 **THE COURT:** Sure. Oh, sure.

10 **THE WITNESS:** You know, obviously, when an expert is
11 looking at evidence, you have to consider, you know, the source
12 of the evidence, and try to weigh it for credibility as best you
13 can. But what I found to be interesting about the report, the
14 two reports that Mr. Boyd made, statements asking the officers
15 to shoot him, on Larch Way, was that they came from two
16 witnesses who were very far apart, distance-wise.

17 Mr. Campos was in his home, and I believe, on the
18 third floor, looking down. Mr. Loeb, you can correct me if I'm
19 wrong. And he had -- he had a full view of Mr. Boyd. And he
20 could --

21 **THE COURT:** We're not going to deal with credibility.

22 **THE WITNESS:** Okay. That's fine, Your Honor.

23 **THE COURT:** I don't think it's really even for the
24 expert to necessarily do that.

25 **THE WITNESS:** Absolutely.

1 **THE COURT:** You would get a hypothetical, or be given
2 the facts. Ultimately, if you testify in the trial, you really
3 won't be able to rely on what was in the depositions. It's
4 going to be what the witness came out with in court. Because
5 that's all the jury is going to have. And then, that's what you
6 would base your opinion on. But, you have to review somewhere,
7 and prepare somewhere, and that's the purpose of looking at a
8 deposition.

9 Okay. As I understand it, you've got "You can shoot
10 me now," that was said at the time. And then you have the
11 comments made to the Oakland officer, whatever was said. I
12 forget exactly whatever was said.

13 **MR. WIENER:** "Go ahead and" -- demanding that they
14 shoot him.

15 **THE COURT:** Yeah. All right. But I do want to make
16 clear that I am not prepared to simply accept that you can take
17 all the facts in an event, start extrapolating from those facts,
18 and then say that's evidence.

19 What I understand is they're using what would be --
20 maybe I'm wrong. If you start saying evidence is anything from
21 which you can infer a suicidal intent, then that isn't really
22 the same as saying direct evidence of suicidal intent, which
23 could be a note, an expression of wanting to take one's own
24 life, or something of that nature.

25 If the study used this broader definition, then I

1 would like to know if that's typical of studies, because
2 ultimately what we're going to determine is whether this is some
3 idiosyncratic view, or whether it's something that is used
4 regularly in the psychiatric community.

5 So, if -- maybe we could go back to suicidal intent
6 in -- in any of the others, and just determine what other
7 studies have felt would be evidence of suicidal intent,
8 generally.

9 **MR. WIENER:** All right. Well, and perhaps Dr. Keram
10 can address the distinction that the Court just made.

11 **BY MR. WIENER:**

12 **Q** If -- if you understand that?

13 **A** I don't -- I don't -- I don't want to seem like a
14 sycophant, but I very much appreciate your -- your questioning,
15 because it's the exact same process that I went through over the
16 years of learning about this phenomena.

17 **THE COURT:** Okay.

18 **THE WITNESS:** So, let me just go through each study,
19 and tell you.

20 **THE COURT:** All right.

21 **THE WITNESS:** In this particular study I was
22 mentioning to you, the Hutson study, there's a table that's
23 labeled "Evidence that Suicidal Individuals Specifically Wanted
24 Law Enforcement Officers to Shoot Them During the Suicide by Cop
25 phenomena." And of course --

1 **THE COURT:** Wait a minute. That's number two. Right?

2 In other words, number two is evidence they
3 specifically wanted the officer to shoot them. That could be a
4 declaration, "Shoot me, shoot me." All right. That would be
5 one, which you, I guess, have here, in our case as described.

6 But how about number one? The evidence of suicidal
7 intent. What --

8 **THE WITNESS:** Okay. I'm sorry.

9 **THE COURT:** What was the study used for that?

10 **THE WITNESS:** Okay. In the Results section, that's
11 described. It says (As read), "Evidence of suicidal intent for
12 all suicide-by-cop individuals consisted of verbal communication
13 to family or friends in 65 percent of cases, in exhibiting
14 suicidal characteristics or behavior in 43.5 percent of cases,
15 verbal communication to officers in 27.1 percent of cases, and
16 written communication in 4.3 percent of the cases. All cases
17 demonstrated suicidal intent by one or more of the above-listed
18 methods."

19 **THE COURT:** Give any examples?

20 **THE WITNESS:** Pardon me?

21 **THE COURT:** Do they give any examples?

22 **THE WITNESS:** Not -- not -- I don't -- you know, I'd
23 have to go through this paper. This was not a case report --
24 you know, it's not going to be a case report where --

25 **THE COURT:** I'm not even thinking about this one

1 study, alone.

2 **THE WITNESS:** Uh-huh.

3 **THE COURT:** I'm thinking more in terms of -- maybe I
4 could just ask you, are the factors that were used in the Los
5 Angeles Sheriff's Office population here, are those
6 traditionally used by psychiatrists in identifying whether
7 someone did commit suicide by cop?

8 **THE WITNESS:** Yes.

9 **THE COURT:** Okay. And, in using those factors, is
10 there some commonly-accepted group of behaviors that would
11 constitute, quote-unquote, evidence of suicidal intent?

12 In other words, we know this -- this study, in kind of
13 a broad definition, used verbal communication. In other words,
14 what somebody said to family or friend. We don't know exactly
15 what that would be. And also, to the officers, we don't know
16 exactly what that might be. But, something.

17 And then, behavior exhibiting suicidal
18 characteristics, we don't quite know what that would be, either.
19 I mean, it's a very broad category.

20 **THE WITNESS:** Yes.

21 **THE COURT:** So, I'm just wondering, are there any
22 commonly-accepted behaviors within that broad --

23 **THE WITNESS:** Yes. I'll refer to a second study that
24 does have case reports in it.

25 **THE COURT:** Okay. Okay.

1 **THE WITNESS:** This is a study that was authored by
2 Kris Mohandie and Reid Meloy, that was published in 2000, called
3 "Clinical and Forensic Indicators of Suicide by Cop."

4 The first case that they report is a suspect who had
5 killed his girlfriend several days prior to returning to his
6 former workplace, and shooting a co-worker. He had made it
7 known in conversations with witnesses that he would, quote, "Not
8 go back to jail," end quote.

9 I -- researchers in the area of suicide by cop accept
10 expressions that the person will not go back to jail or prison
11 as evidence of suicidal intent, as this paper reflects.

12 **THE COURT:** Is that typical?

13 **THE WITNESS:** It's actually a fairly common finding,
14 that the person will either express it directly, or will be
15 facing a -- a lengthy sentence.

16 And in fact, the researchers who work in California
17 have specifically commented on the increasing percentage of
18 suicide-by-cop cases over time, and wondering if the passage of
19 the three-strikes law, which seems to parallel that development,
20 is a factor in that development. And, that's specifically
21 mentioned in the literature.

22 **THE COURT:** So, evidence of suicidal intent, it seems
23 to me, wouldn't be limited to suicide by cop. In other words,
24 psychiatrists generally are looking at evidence of suicidal
25 intent.

1 **THE WITNESS:** Absolutely. The first question that
2 anybody worth their salt who is referred this type of case for
3 analysis looks at is, was this person suicidal? And if they're
4 not, then it's not going to be a suicide by cop.

5 In fact, I was just referred a case last month where
6 that was the referral question, and the decedent didn't clear
7 that first threshold, given the material I had. And I -- you
8 know, it was my opinion to the -- to the defense attorney.

9 But, --

10 **THE COURT:** Okay. So, I think what you are saying, if
11 I understand, then, is from a medical standpoint -- and assuming
12 the researchers in the L.A. study were coming at it from a
13 medical standpoint, and I gather that they were --

14 **THE WITNESS:** They were. Yes.

15 **THE COURT:** All right. That what a medical doctor
16 might deem, quote-unquote, evidence of suicidal intent, might be
17 a broader set of behaviors than what a layperson, simply looking
18 at overt behavior, might think was evidence of suicidal intent.

19 **THE WITNESS:** Correct.

20 **THE COURT:** The layperson might mean something more
21 direct than what a medical doctor might consider, quote-unquote,
22 evidence of suicidal intent. Is that fair to say?

23 **THE WITNESS:** It's absolutely fair to say.

24 **THE COURT:** All right.

25 **THE WITNESS:** In addition, it's not just laypeople,

1 but police officers as well.

2 **THE COURT:** Yeah. Well, they're laypeople.

3 **THE WITNESS:** Okay. Non-medical people. Okay.

4 **THE COURT:** I'm distinguishing doctors from other
5 people.

6 **THE WITNESS:** Right.

7 **THE COURT:** We'll just put it that way. All right.

8 **THE WITNESS:** Right. So for example, things that
9 might catch my eye in reviewing a case, you know, somebody else
10 might just pass right over. Yeah.

11 **THE COURT:** Okay. So, when I say "layperson," I'm
12 distinguishing a doctor -- and in particular a psychiatrist, a
13 psychologist trained in the area -- from other people who don't
14 have that training.

15 So, it may be that when doctors -- not just yourself,
16 personally, but psychiatrists -- see a certain set of behaviors,
17 that they may draw an unreasonably medical inference that this
18 person is suicidal, that a person not trained in the field would
19 not draw.

20 **THE WITNESS:** Correct. And that was absolutely
21 evident in Mr. Boyd's case.

22 **THE COURT:** All right. So, then, you might then --
23 have we covered the factors that you feel are evidencing of
24 suicidal intent?

25 We have the -- well, we have the firing at the

1 officers. That does seem to overlap somewhat with escalating
2 the encounter.

3 **THE WITNESS:** Yes. It is. But -- but because
4 escalating the encounter is in the service of the eventual
5 suicide.

6 **THE COURT:** They're not mutually exclusive.

7 **THE WITNESS:** No. Not at all.

8 **THE COURT:** So you can double-count, I gather.

9 All right. Keep going.

10 **BY MR. WIENER:**

11 **Q** And then, I think we've covered specific desire to be shot
12 or -- is there anything -- or, can you just describe why you
13 believe that he had a -- he exhibited a specific desire to be
14 shot?

15 **A** Let me just back up and finish up the evidence of suicidal
16 intent.

17 **Q** Oh. Sorry.

18 **A** Because it's not just a set of beha- -- you asked me about
19 the incident.

20 **Q** Yes.

21 **A** It's not just a set of behaviors. It's also looking for
22 risk factors.

23 Mr. Boyd -- Mr. Boyd's risk factors -- I'm assuming, as a
24 basis for this opinion, that he was looking at a lengthy prison
25 term. And that is a recognized risk factor for suicidal intent.

1 Not only in suicide-by-cop cases, but in other cases, as well.

2 In addition, he had just passed a very significant
3 anniversary. The loss of his legs occurred at the end of April
4 in 1993 or -- yeah, April of 1993. It was approximately
5 April 20th or 23rd. And he had the incident in Oakland on
6 May 2nd, and then in San Francisco on May 5th.

7 And, a psychiatrist really can't ignore that fact, because
8 anniversaries of trauma of that magnitude are known to bring up
9 all of the issues that the individual has experienced since that
10 time. And we can see that Mr. Boyd's trajectory in his life
11 really came -- took a completely different direction after that
12 loss.

13 So that's -- that loss, even though it occurred eleven
14 years earlier, is felt more keenly around anniversary times.

15 **THE COURT:** Well, I know that people certainly are
16 aware of certain anniversaries, of deaths, for example, and
17 families and things of that nature.

18 Do they actually have in their mind, either
19 consciously or subconsciously, this idea of an annual event,
20 or -- each year?

21 **THE WITNESS:** Yes.

22 **THE COURT:** Going back to when they suffered some
23 other problem?

24 **THE WITNESS:** Absolutely. Your Honor, it is almost a
25 daily event for me, in my clinic with the Vietnam veterans,

1 where they will tell me something like, "I'm coming up to my bad
2 time of year." And they'll note that -- they'll need an
3 increase of sleeping medication or something for agitation, or
4 that we'll spend a lot more time talking about survivor's guilt,
5 or if they've lost a limb or -- or more than one limb, that
6 we'll be talking more about that, at that time.

7 **THE COURT:** Is the bad time of year triggered, then,
8 by an event that occurred at about that time of year, although
9 many years earlier?

10 **THE WITNESS:** Yes.

11 **THE COURT:** But, some terrible thing that happened to
12 them.

13 **THE WITNESS:** Yes, yes.

14 **THE COURT:** Or someone close to them.

15 **THE WITNESS:** Absolutely. So, for a substantial
16 proportion of my Vietnam vets, it's around the Tet Offensive,
17 which we usually think of as, you know, 1968. But the fact is
18 there was a Tet every year. So it's not just the people who
19 were in country that year.

20 And now, actually, I'm seeing it in my Iraq vets, and,
21 well, where I had a guy, a Marine sniper who was in the Battle
22 of Fallujah -- the November battle. And that one -- there were
23 several Battles of Fallujah.

24 On the anniversary of that, he got extremely agitated,
25 irritable, had insomnia, was very depressed, and became

1 suicidal. Had no idea why. Had no idea why. And, I put it
2 together for him, and he sort of deflated the anxiety.

3 **THE COURT:** All right. So this, again, is a
4 recognized phenomenon.

5 **THE WITNESS:** Yes. Absolutely. It's written about in
6 trauma literature.

7 **THE COURT:** All right. I think you were -- she was
8 adding to any other factors that -- or evidence of suicidal
9 intent. Were there any others that you --

10 **THE WITNESS:** No, not that I can think of right now.

11 **THE COURT:** Okay, all right.

12 **BY MR. WIENER:**

13 **Q** Let's move on to the specific desire to be shot, and I
14 know we might have covered this, to an extent.

15 Can you describe your bases for believing that Mr. Boyd,
16 based on what you reviewed, met that criteria?

17 **A** Okay. This may be an example where some of his behaviors
18 are going to catch my eye in a way that may not catch a
19 layperson's eye.

20 The fact that he engaged in behavior that appeared to be
21 directed toward the goal of taking a hostage is very significant
22 to somebody working in suicide by cop. The fact that he shot at
23 officers during -- well, the fact that he initiated a pursuit
24 and then shot at officers during the pursuit is evidence that he
25 wanted officers to shoot them, as is his behavior on Larch Way.

1 Coming to a stop, then moving towards Officer -- Moody, I
2 believe it was. I'm sorry, was it -- it was one of the officers
3 coming from Laguna -- O'Malley. I'm sorry, it was Officer
4 O'Malley. The fact that he was noncompliant with commands, with
5 law enforcement commands while they had their weapons pointed at
6 him.

7 Then the behavior that he exhibited in moving for his
8 waistband is something that's mentioned in the suicide-by-cop
9 literature as an attempt to draw fire, as well as the apparent
10 attempts to take something from the car, and repeated attempts,
11 when it doesn't work -- if you accept my hypothesis that he's
12 trying to draw fire, you know, the repeated efforts with an
13 escalating level of urgency or intent.

14 And, I've seen that in other cases of suicide by cop, as
15 well. And that's a reason why that particular behavior would
16 grab my eye. And I can explain, for each one of those, why I
17 think that that's evidence that he wanted the officers to shoot
18 them -- to shoot him.

19 **THE COURT:** Why don't we look at
20 the appear-to-be-taking-a-hostage one, which is more unique, and
21 the repeated reaching toward the car.

22 **THE WITNESS:** May I ask you a question, Your Honor?

23 **THE COURT:** Uh-huh.

24 **THE WITNESS:** Why do you say it's more unique?

25 **THE COURT:** Well, appearing to take a hostage, as

1 opposed to just wanting to kidnap someone. In other words,
2 you've drawn the conclusion, really he didn't want to take this
3 woman, he was doing it for some reason -- ulterior reason, as I
4 gather.

5 In other words, there are people who take people, and
6 then they get them, and they either take their money or they
7 commit sexual offenses, or they do something that that person
8 wouldn't have wanted them to do if they weren't being threatened
9 with a weapon. And it isn't because they want to get killed by
10 a police officer; they actually want to do whatever they are
11 doing, for whatever odd reason.

12 Here, the idea is that although he purported to be
13 trying to kidnap a woman, he really wasn't -- that wasn't really
14 what he wanted to do, in the sense that he didn't really want to
15 get her and do something with her of the traditional criminal --

16 **THE WITNESS:** I see what you are saying.

17 **THE COURT:** All right.

18 **THE WITNESS:** Yes.

19 **THE COURT:** And also you called her a hostage, as opp-
20 -- which I ordinarily think of as a bargaining chip, as opposed
21 to just a victim. Okay. So, it was those two things.

22 **MR. WIENER:** Your Honor, if I may, I had a different
23 understanding of what Dr. Keram may have meant by saying
24 "appearing to" --

25 **THE COURT:** "Take a hostage"?

1 **MR. WIENER:** I don't know, maybe she can clarify what
2 she meant by saying "appearing to take a hostage."

3 **THE COURT:** Sure.

4 **THE WITNESS:** I just wanted to be very clear that I
5 don't have a crystal ball, and so, I'm looking at a variety of
6 explanations for the behavior that he engaged in around that
7 incident. And we can also talk about the Tiffany Williams
8 incident as well.

9 So, what I'm doing is looking at a variety of
10 different explanations, but I can't tell you for sure which one
11 best -- well, I can tell my opinion about which one best
12 represents his intent, but I can't tell you with certainty which
13 one really does represent his intent. And that's why I say
14 "appearing."

15 **THE COURT:** Okay. In testing whatever opinion would
16 be given by Dr. Keram, the Court is looking, as I said, not
17 simply at what her own personal view is, but whether that view
18 is arrived at by way of an analysis that is shared by someone
19 other than just herself. All right. And traditionally, some
20 number of recognized people in the field.

21 **THE WITNESS:** Yes.

22 **THE COURT:** So, if -- if there are a number of
23 behaviors -- and some of them are classic, and you want to say
24 those are classic, and then you want to say the others are
25 perhaps less often talked about, or you have drawn some

1 conclusion based on extrapolating from something else, that's
2 fine, too, but these are what you have described as evidence of
3 -- I think we're on No. 2.

4 **THE WITNESS:** Yes.

5 **THE COURT:** Just, simply wanted the officers to shoot
6 him.

7 **THE WITNESS:** Yes.

8 **THE COURT:** Right. Okay. And some of the things
9 were, he said, "Shoot me." That seemed pretty good.

10 **THE WITNESS:** Uh-huh.

11 **THE COURT:** And then, you have some behaviors that
12 are, let's say, contested, but if in fact the jury finds that
13 they occurred, such as that he stopped in the car and then moved
14 again toward Officer O'Malley, you would describe that, I
15 gather, as provocative in some way.

16 Maybe he just wanted to get out of there. We don't
17 know, exactly. It might not be as strong evidence as, you know,
18 "Shoot me, shoot me."

19 Then you have moving towards his waistband. That
20 would seem, again, provocative. You had appearing to go for an
21 object in the car, and then trying it more than once when it
22 didn't work. And I thought that was something I might want to
23 hear a little more about.

24 **THE WITNESS:** Uh-huh.

25 **THE COURT:** And the first one which struck me was

1 appearing to take a hostage.

2 **THE WITNESS:** Okay. Let me tell you what the
3 literature says, and let me tell you how I think Mr. Boyd fits
4 in.

5 **THE COURT:** Great.

6 **THE WITNESS:** The liter- -- what we know is that law
7 enforcement contacts that involve a hostage situation have a
8 higher degree of likelihood of ending in a fatality than those
9 that don't.

10 Okay. What we saw on the second -- well, let me just
11 say what the literature says. Okay?

12 **THE COURT:** Okay.

13 **THE WITNESS:** Suicide-by-cops scenarios frequently
14 arise in situations in when there's either a domestic-violence
15 call, or a hostage situation, or a hostage/barricade situation.
16 So -- those are recognized phenomena in the suicide-by-cop
17 literature.

18 **THE COURT:** Does this come up on the spur of the
19 moment? Or does somebody get a whole plan together to do this?

20 **THE WITNESS:** It completely depends on the individual.
21 And, that's such a good question. I can tell you sort of how
22 have I think about the categories, and how I do my training on
23 the different categories of when intent develops. But we can --

24 **THE COURT:** Like we also, like Dog Day Afternoon,
25 something where someone -- a movie or somebody gets --

1 **THE WITNESS:** Yes, yes.

2 **THE COURT:** -- essentially has no choices, but they
3 didn't plan it that way. They planned to have a successful
4 robbery. It went wrong. And then it's a question of what do
5 you do at that point?

6 **THE WITNESS:** Absolutely.

7 **THE COURT:** And that's different than a plan laid out
8 well in advance, to fail.

9 **THE WITNESS:** Right.

10 **THE COURT:** In a hostage situation.

11 **THE WITNESS:** Right, exactly. And I believe the -- if
12 you accept --

13 **THE COURT:** By the way, Mr. Wiener is too young, you
14 may well be, too --

15 **THE WITNESS:** No, no, no, I'm not, I --

16 **THE COURT:** -- to know about the movie unless he's a
17 movie buff, but anyway, it's Al Pacino.

18 **THE WITNESS:** This is -- this is my Preference,
19 Preference hiding my true age here. I definitely remember that
20 movie, yeah. And actually, I remember the incident. I grew up
21 in New York.

22 **THE COURT:** Oh, okay.

23 **THE WITNESS:** That was pretty exciting.

24 (Off-the-Record discussion)

25 **THE WITNESS:** Okay. The original question has to do

1 with two --

2 **THE COURT:** The court reporter is reciting lines from
3 the movie. (Laughter)

4 **THE WITNESS:** Okay. The question is whether or not
5 the presence of taking a hostage -- the action of taking a
6 hostage or a law enforcement officers arriving on the scene
7 after a hostage is taken is a known risk factor for
8 suicide-by-cop cases, and the answer is yes.

9 And it's evidence of suicidal intent, because of the
10 high degree of lethality in hostage-taking situations.
11 Because -- you said bargaining chip. And unfortunately, here
12 the bargain is a different -- a different negotiation. It's not
13 "Let me go and give me the million dollars and the plane to
14 Algeria," it's "Kill me." You know. And so, the behavior
15 towards the hostage is frequently different, if there is a
16 successful hostage-taking.

17 Now, here is why this particular behavior on
18 Mr. Boyd's part caught my eye. He had an unsuccessful -- he had
19 several unsuccessful attempts on May 2nd, in initiating a law
20 enforcement pursuit.

21 He -- he twice drove in an area that was heavily
22 populated, so you would expect that the police -- and there was
23 a large police presence there, as well, because it was a Cinco
24 de Mayo festival, at the end of a Cinco de Mayo festival, so a
25 large crowd dispersing, heavy police presence.

1 And he initiated a high-speed pursuit in that context,
2 which the police broke off because he was going 75 to 80 miles
3 an hour, they estimated. After they broke off that first
4 pursuit, somewhere -- and officers' estimates are a little bit
5 different, but some are between nine and 12 minutes later, he
6 comes back to close to that original area, and exhibits the
7 exact same behavior. A pursuit is again initiated.

8 **THE COURT:** Right.

9 **THE WITNESS:** And again broken off. And then he comes
10 back a third time, and they are able to stop him from leaving.

11 What he has learned -- what I infer that he has
12 learned in that situation, is "Crowd isn't good enough." Okay.
13 Than -- the reason the hostage is significant to me is that --

14 **THE COURT:** Is it they won't give up the chase if
15 there's somebody else in the car?

16 **THE WITNESS:** That's -- that's my thought, or that if
17 he demonstrates that he's willing to take a hostage -- you know,
18 he's not successful either with Tiffany Williams or Tanika
19 Hogan, in getting them into the car. But he has demonstrated a
20 willingness to take a hostage at gunpoint.

21 And that -- that puts something into the mind of a
22 police officer, that it wouldn't put into the mind of an
23 ordinary citizen.

24 **THE COURT:** In this particular instance, though, there
25 -- he doesn't grab a person in the immediate presence of the

1 police.

2 **THE WITNESS:** Correct.

3 **THE COURT:** And so, how would he anticipate, if you
4 will, that he would come to the attention of the police, if he
5 simply grabs someone and put them in the car, and then drove
6 around with a gun pointed at them so they wouldn't jump out, or
7 scream, or do anything to call attention to the police.

8 **THE WITNESS:** Yeah. Yeah. Well, you're asking a
9 hypothetical. And, you know, I could tell you what my opinion
10 about it is.

11 **THE COURT:** Are you saying that he never intended to
12 get the person in the car at all?

13 **THE WITNESS:** Its possible.

14 **THE COURT:** Well, of course, anything's possible.

15 **THE WITNESS:** Yes, yes.

16 **THE COURT:** You know, we are dealing here with -- I
17 guess what you are saying is that hostage taking is a recognized
18 concept in suicide by cop.

19 **THE WITNESS:** Correct. It's a recognized risk factor
20 of suicidal intent, of wanting the officers to shoot you.

21 **THE COURT:** All right.

22 **THE WITNESS:** And so he is demonstrating at least two
23 behaviors that indicate to the police that he's dangerous,
24 violent, may involve other people, and will shoot at them as
25 well. So, he's putting into the minds of an officer what he may

1 not be putting into the mind of a citizen who is witnessing
2 this.

3 **THE COURT:** Yeah, if an officer were there. But there
4 isn't any officer there.

5 **THE WITNESS:** They don't have to be there. They get
6 it on the radio.

7 **THE COURT:** If somebody calls them.

8 **THE WITNESS:** Well, Ms. Hogan did.

9 **THE COURT:** Yes. So, she did call, because he didn't
10 actually take her --

11 **THE WITNESS:** Right --

12 **THE COURT:** -- as a hostage.

13 **THE WITNESS:** Yes, of course.

14 **THE COURT:** Now there's nobody in the car, there's
15 nobody to use as a bargaining chip.

16 **THE WITNESS:** Right.

17 **THE COURT:** There's just somebody driving around at
18 high speed again, which was his failed attempt in Oakland.

19 **THE WITNESS:** Uh-huh. Well, he may have been
20 thinking -- I mean, it's certainly possible that he was thinking
21 that it was better to scare her and then let her go, so she
22 could go call the police.

23 **THE COURT:** To make him look more dangerous than he
24 looked earlier, as just a bad driver?

25 **THE WITNESS:** Yes.

1 **THE COURT:** Okay. All right. So, it really wouldn't
2 be a typical hostage, exactly, situation, but --

3 **THE WITNESS:** But not atypical for a suicide-by-cop
4 scenario.

5 **MR. WIENER:** Atypical?

6 **THE WITNESS:** Right. Not atypical.

7 **THE COURT:** Right. Because we can all hypothesize,
8 without being doctors, what was going on in this person's mind.

9 **THE WITNESS:** Yes.

10 **THE COURT:** And think of all manner of scenarios, and
11 probably write a few movie scripts, ourselves, in the process.
12 So the question is really whether -- whatever your inferences
13 are from his behavior, whether these are inferences that would
14 be drawn in some routine or recognized way --

15 **THE WITNESS:** Yeah.

16 **THE COURT:** -- by the doctors, and maybe this one
17 doesn't fit tightly in that picture --

18 **THE WITNESS:** I think other doctors would note that,
19 and would note the importance of the attempt at taking a
20 hostage. Whether it was goal-directed or -- regardless of what
21 the goal was.

22 I'm not sure that a citizen would have the same
23 attachment to it that a researcher would.

24 **THE COURT:** No, I don't think they would.

25 **THE WITNESS:** Yeah, yeah.

1 **THE COURT:** Okay. How about this appearing to take
2 the objects? How did that play in to your --

3 **THE WITNESS:** Well, I mean, obviously he shot at the
4 officers twice during the pursuit. And then, he went for his
5 waistband, which is another behavior that is described in the
6 suicide by cop.

7 **THE COURT:** When was that -- if I could ask
8 Mr. Wiener, in the encounter does he go for his waistband?

9 **MR. LOEBS:** There was a witness observation of him
10 reaching in that area when he was outside of the car.

11 **THE COURT:** Before the hands went up? Or --

12 **MR. WIENER:** I think it was after they went down the
13 first time.

14 **MR. LOEBS:** I think, Your Honor, there's different
15 testimony. There's many witnesses.

16 **THE COURT:** Exactly.

17 **MR. LOEBS:** One police officer says he saw his hands
18 go down to his waistband at some point.

19 **THE COURT:** But he doesn't --

20 **MR. LOEBS:** -- taking off his shirt, which is a motion
21 down to the waistband as well. When the officers were pointing
22 their guns at him, and saying, "Keep your hands in the air, get
23 on the ground," he was doing other things which was not
24 compliant with that.

25 **THE COURT:** Okay. Okay. All right.

1 **THE WITNESS:** May I have some more water, please?

2 **THE COURT:** Yeah. Mr. Loeb, you're apparently in
3 charge of the water here. Thank you. We usually have a
4 pitcher, but again, this is a temporary courtroom we're using.

5 Okay. Do you want to go to some of the other ones,
6 then? You were on Two. We know he had a gun, so Three is --

7 **MR. WIENER:** And Your Honor, can I just follow up
8 about the hostage issue?

9 **THE COURT:** Yes, yes.

10 **BY MR. WIENER**

11 **Q** In terms -- as recognized in the literature, and amongst
12 psychiatrists, what is the precise purpose of hostage-taking or
13 attempted hostage-taking in terms of precipitating a suicide by
14 cop?

15 In other words, what is, at least as recognized in the
16 literature, the linkage between doing that?

17 **A** Several-fold. The links are coming to police attention.
18 That -- that's often, you know, the way the call starts. And
19 then, threatening the hostage as the means of creating the
20 impression of imminent lethal threat to a citizen, that
21 precipitates the use of lethal force by law enforcement.

22 **Q** And does a failed hostage-taking, whether it's
23 intentionally failed or unintentionally failed, can that lead to
24 the result of coming to police attention?

25 **A** Yes. So can a hostage fleeing.

1 Q And, the Tiffany -- the attempted kidnapping of Tiffany
2 Williams --

3 A Excuse me. I'm free-associating to another case that I was
4 involved in.

5 Q Yeah.

6 A We had a shooting in Sonoma County, I think it was in 2000,
7 in about April of 2000. The -- the jurisdiction was in the
8 Sonoma County Sheriff's Office. The 911 call was a woman
9 calling from her home, and saying that she was being held
10 hostage in her home by a knife-wielding assailant. The -- the
11 Sheriff's Deputies went over there.

12 And, a series of events occurred that led them to enter the
13 home, to break down the door and enter the home. They were met
14 by a woman coming at them holding a knife in a knife-pick
15 fashion (sic) and they shot and killed her (Indicating). That
16 woman was the person who made the 911 call.

17 So, the notion of creating in law enforcement's mind that
18 there's a hostage is a known way of bringing yourself to
19 law-enforcement attention.

20 And, one other fact about that particular case that was
21 very interesting. I didn't -- I didn't enter that case as a
22 consultant for law enforcement or the plaintiff's attorney. The
23 family of the woman who died sued her psychiatrist.

24 And -- this is such a sad case for everybody involved.
25 The -- so, the malpractice company asked me to take a look at

1 the file.

2 The boyfriend reported that just prior to this event, there
3 had been a shooting on the Oakland Bay Bridge that was thought
4 to have perhaps been a suicide by cop, and it was reported very
5 heavily on our local news channel. When the couple -- the
6 boyfriend and the woman that died -- watched the news that
7 night, she said to him, "You know, that's what I'm going to do.
8 I'm going to commit a suicide by cop, you know. That will do
9 the job right." She had been suicidal for some time.

10 But, he unfortunately never communicated that to the
11 psychiatrist. Neither did she.

12 **THE COURT:** The last one, intentionally escalating,
13 you have quite a bit on that already.

14 **MR. WIENER:** Right, yeah. Your Honor, if I may, just
15 two quick things? I promise I'll be fast.

16 **THE COURT:** Okay, sure.

17 **BY MR. WIENER:**

18 **Q** Did the proximity of Tiffany -- of the Tiffany Williams
19 incident to the Tenderloin Police Station have significance for
20 you, in terms of your opinions?

21 **A** Absolutely.

22 **Q** Can you please describe them?

23 **A** There is greater opportunity that the cars are going --
24 that, you know, police officers are going in and out of the
25 area. It's an area where there is, you know, undercover police

1 officers, and heavy -- you know, a more heavy presence then,
2 say, some other neighborhoods in San Francisco.

3 **Q** And, did the proximity of the Tatanika Hogan incident to
4 the location of Officer Mason, on another call, did that have
5 any significance for you?

6 **A** Yes, it did. Although, you know, we don't know positively
7 that Mr. Boyd was aware that they were there. It was very
8 close, you know, a number of blocks away from the initial
9 contact with Tiffany Williams. So, a failed effort to bring
10 yourself to law enforcement attention is then followed by
11 another effort.

12 **Q** The location of Tatanika Hogan, the second kidnapping
13 attempt, the proximity of that kidnapping attempt to the
14 location of Officer Mason, did that have any significance?

15 **A** Oh, I'm sorry. Officer Mason --

16 **Q** The person who took the report from Tatanika Hogan.

17 **A** Right. Well, for several reasons. I mean, he had been in
18 that area, and stopped prior to this incident.

19 **THE COURT:** "He" being --

20 **THE WITNESS:** Mr. Boyd.

21 **THE COURT:** He had been stopped prior? Was.

22 **THE WITNESS:** Not on that date, you know.

23 **THE COURT:** Had he been stopped in that area by police
24 earlier?

25 **THE WITNESS:** I believe he had.

1 **THE COURT:** Okay. That might not be a fact I'm
2 totally aware of.

3 **THE WITNESS:** Okay.

4 **THE COURT:** But I don't want to belabor this point,
5 because we're not here to take her trial testimony, and every
6 incident in the witness's opinion.

7 What we are here to do is see whether the opinion is
8 sufficiently based in recognized medical or psychiatric
9 principles to not simply represent a validation of the
10 Defendant's theory of what happened here.

11 **MR. WIENER:** Right.

12 **THE COURT:** All right. That's essentially what we are
13 doing.

14 **MR. WIENER:** I brought that up in response to
15 Your Honor's indication that there were no police immediately
16 there, because Officer Mason was quite close to where the Hogan
17 incident happened.

18 **THE COURT:** Can't you just say to the witness,
19 "Weren't there police around," or "Were there police around?"

20 **THE WITNESS:** Yeah.

21 **THE COURT:** We're not going to get into concerns about
22 leading questions.

23 **MR. WIENER:** Okay.

24 **THE COURT:** So, that would shorten things up. All
25 right. Now, in any event, in any event, so, some of the factors

1 you've described, then, you would say are traditionally used.
2 All right.

3 One of the points that is made by the Plaintiff in
4 this case is that the behavior of Mr. Boyd on the scene at the
5 time that he is shot and just before, is inconsistent with
6 suicide by cop. That his behavior is of a surrendering nature,
7 not trying to get himself shot.

8 How does that apparent surrender or actual intent at
9 the moment to surrender fit into the picture of wanting to get
10 shot? Why didn't he just come out of the car with the gun in
11 his hand? That would be quick, and fast, and someone would say
12 "Put it down," and he wouldn't; he'd be dead.

13 **THE WITNESS:** Right.

14 **THE COURT:** So why go through this whole other set of
15 behaviors, if you will?

16 **THE WITNESS:** Right. There are three scenarios that
17 are described in the suicide-by-cop literature that explain why
18 people -- why all people who committed suicide by cop don't just
19 come out, you know, with the gun, you know.

20 **THE COURT:** All right.

21 **THE WITNESS:** Which certainly happens, but not in the
22 majority of cases.

23 **THE COURT:** All right. Well, that is an interesting
24 factor. And why don't you pursue that for a moment.

25 **THE WITNESS:** Okay. So, there are three. One is that

1 the -- the person who -- people who suicide are frequently
2 ambivalent throughout the course of the act. Regardless of
3 their choice of method.

4 In fact, of all of the patients that I have had who
5 have attempted suicide, even if their attempts were fairly
6 lethal and they -- they're alive by the skin of their teeth, a
7 lot of them describe -- most -- the majority describe being very
8 ambivalent about it: "Should I? Shouldn't I? Should I
9 shouldn't I?" I really have had only one patient telling me,
10 "I'm pissed off that I'm alive, I was really dead set on this."

11 So, that ambivalence combined with the fact that this
12 event, this suicide-by-cop event is not a walk in the park for
13 the person involved. They are tremendously agitated and
14 tormented inside. And, that slows things down as well, the
15 thinking, you know, about it. So, I think that ambivalence and
16 the difficulty of what they're about to do, if they're dead set
17 on it, combine to make their behavior -- their intent less
18 obvious.

19 **THE COURT:** Has this been recognized in the
20 literature?

21 **THE WITNESS:** Yes. Yes.

22 **THE COURT:** That it's not simply that you plan it out
23 in the way that you might be planning a dinner party, so to
24 speak, and carry it out in that fashion.

25 **THE WITNESS:** Absolutely.

1 **THE COURT:** Okay.

2 **THE WITNESS:** And then, there are two other reasons
3 why --

4 **THE COURT:** Okay.

5 **THE WITNESS:** One is that -- that are described in the
6 literature. One is that people who had animosity towards law
7 enforcement may be playing a very sadistic psychological form of
8 warfare with law enforcement.

9 And, you know, I didn't really believe this,
10 although -- you know, I grew up in a fairly household, I didn't
11 really understand the intense animosity that people could have
12 until, you know -- I started asking my patients back when I
13 started working in this area if they had thought about
14 committing a suicide by cop. And then, those that did, I would
15 try to, obviously, talk out of it.

16 One of them was a Vietnam veteran who had been in the
17 Hells Angels for many, many years. I had had some success with
18 another veteran, trying to talk him out of his suicide by cop by
19 trying to get him to empathize with the experience of a law
20 enforcement officer. So with this guy, you know, I said, "Okay,
21 take me through your scenario." And he took me through the
22 whole thing, up until he got shot.

23 And I said "Okay, fine." You know, "What happens
24 next?"

25 And he goes, "Well, what do you mean, 'What happens

1 next?' I'm dead."

2 And I'm like, "Yeah, you're dead, but what about the
3 cop?"

4 And he looks at me, and he goes -- excuse me for this
5 -- he says, "Fuck the cop, Dr. Keram. Don't you get it? I hate
6 the fucking cops." Okay. And he said, "I want to fuck up as
7 many of them on the way out as I can."

8 Okay. And -- and he went into this whole scenario of
9 how they had tormented him, and harassed him unfairly over the
10 years, and -- you know, when he was going out, the reason he was
11 picking suicide by cop as his method of going out was to inflict
12 psychological harm and damage in a cat-and-mouse game with them,
13 as possible.

14 **THE COURT:** Why would he think that they would care?
15 In other words, if these are people who the decedent perceives
16 of as sadists, why would it bothers them -- why would the
17 decedent would think it would both them that they had managed to
18 finally kill him?

19 **THE WITNESS:** Because he had killed people. He is a
20 Vietnam veteran who had killed people. And his PTSD -- he had
21 killed people who were trying to kill him, okay?

22 **THE COURT:** Okay. You're saying that he is projecting
23 his own feelings of distress in having killed people on someone
24 who he doesn't perceive as being empathetic at all.

25 **THE WITNESS:** No, see, here's the deal, okay? He's

1 going to appear unarmed, okay, and -- you know, he had created
2 this whole scenario where --

3 **THE COURT:** Are we talking about Mr. Boyd now?

4 **THE WITNESS:** No, no, no, no, no. We're talking about
5 my patient.

6 **THE COURT:** Your Vietnam man.

7 **THE WITNESS:** Yeah, yeah.

8 **THE COURT:** All right.

9 **THE WITNESS:** Yeah.

10 **THE COURT:** Okay.

11 **THE WITNESS:** You know, the whole flow was to inflict
12 damage on the -- psychologically on the officer by, in the end,
13 appearing armed but not being armed. And also, you know,
14 creating the -- the internal affairs investigation, and maybe
15 there would be a DA investigation --

16 **THE COURT:** So, some of the collateral consequences --

17 **THE WITNESS:** Yeah. This guy had thought it through.
18 Up to and including, even, civil litigation.

19 **THE COURT:** All right. So, but in any event, even if
20 what you -- you appear to be saying is there may be collateral
21 consequences that would work to the detriment of the officer,
22 having to be investigated and things like that.

23 **THE WITNESS:** Yes, yes.

24 **THE COURT:** Even if the officer really didn't feel bad
25 about shooting him, but he thought the officer would feel bad.

1 **THE WITNESS:** Your Honor, I -- I don't think that it's
2 correct at all to think that -- that people who hate law
3 enforcement see law enforcement as unfeeling in general.

4 **THE COURT:** Okay. All right. So, now, is this just
5 your one Vietnam patient? Or is this something that's appeared
6 in the literature --

7 **THE WITNESS:** Yes.

8 **THE COURT:** -- and written about in some way --

9 **THE WITNESS:** Yes.

10 **THE COURT:** -- as motivation for using this particular
11 method as opposed to jumping off a building, or something like
12 that.

13 **THE WITNESS:** Yes, it is. It's written in the
14 literature. And in fact, it's about to be published again in
15 the literature in a chapter that Kris Mohandie, who I mentioned
16 earlier, has prepared for publication, as -- as one of the
17 reasons that people pick suicide by cop.

18 **THE COURT:** So, the idea of inflicting distress, sort
19 of PTSD, on the -- on the police officer --

20 **THE WITNESS:** Yes.

21 **THE COURT:** All right, is another reason why one would
22 appear to be surrendering.

23 One could just be you're ambivalent --

24 **THE WITNESS:** Uh-huh.

25 **THE COURT:** -- and you don't really know from moment

1 to moment what you want to do.

2 **THE WITNESS:** Uh-huh.

3 **THE COURT:** The other is that this may be a contrived
4 behavior, to cause the officer later to think about how they did
5 something wrong.

6 **THE WITNESS:** Uh-huh.

7 **THE COURT:** And then, there's a third -- reason?

8 **THE WITNESS:** Yes. There's a third reason, which was
9 originally described in the literature in 2007 by an author
10 named Homant -- H-O-M-A-N-T, his first name is Robert -- that a
11 recognized reason why people choose suicide by cop as their
12 method of suicide is to so that their family members can profit,
13 either through life insurance policies or by resultant civil
14 litigation against the agency.

15 In which case, because of the exclusion in life
16 insurance policies against suicide, and the need for the event
17 not to look like a suicide if it's civil litigation against an
18 agency, for the person to appear to be surrendering, for them to
19 not want it to look like a suicide.

20 **THE COURT:** Now. This is a key feature. And I would
21 like to just follow up briefly with you. This is something that
22 has been recognized in the literature.

23 **THE WITNESS:** Yes, yes.

24 **THE COURT:** In any peer-reviewed articles? Or --

25 **THE WITNESS:** I'm not familiar with the publication

1 that Dr. Homant published that article in. But it is -- it is
2 also recognized as a risk factor in this article by Kris
3 Mohandie. But that hasn't been published yet.

4 **THE COURT:** On the effort to benefit your family, but
5 appear -- but need to appear as if you weren't committing an
6 outright suicide.

7 **THE WITNESS:** Correct, correct. And I have to say
8 that it's mentioned in the suicide literature, that -- that
9 doesn't refer to suicide by cop, in the case of life insurance
10 policies. And, I don't know if Mr. Boyd had a life insurance
11 policy or not.

12 **THE COURT:** I don't think we have any evidence of
13 that, or I haven't heard it yet.

14 **THE WITNESS:** Yeah.

15 **THE COURT:** But, let's look at that a little bit,
16 then, from the broader spectrum. In other words, if you look at
17 suicide by cop as a subset of suicide in the bigger population
18 of just suicides, has this particular phenomenon of not wanting
19 to look like you were committing a suicide been recognized?

20 **THE WITNESS:** Absolutely.

21 **THE COURT:** And, has that been recognized in
22 peer-reviewed articles?

23 **THE WITNESS:** Absolutely.

24 **THE COURT:** All right.

25 **THE WITNESS:** And, I can expand on that if you like.

1 **THE COURT:** That's fine. Why don't you do that.

2 **THE WITNESS:** Okay. People, for a variety of reasons,
3 want to make their suicide not look like a suicide, so they make
4 it look accidental. The reasons, as I mentioned, you know, in
5 the suicide-by-cop literature have to do with life insurance or
6 the civil litigation.

7 But there are other reasons as well. People --

8 **THE COURT:** The insurance would apply to almost any --
9 any insured suicide, would it not?

10 **THE WITNESS:** Certainly. Yes.

11 **THE COURT:** All right.

12 **THE WITNESS:** People who come from religious families
13 don't want their loved ones, when they suicide, to think that
14 they are damned to Hell.

15 So you see things -- see, I don't like the term
16 "suicide by cop." I prefer the term "suicide by proxy." You
17 know, nobody's ever going to adopt that. I just came up with it
18 one day.

19 **THE COURT:** Maybe it will catch on.

20 **THE WITNESS:** Well, I'm not planning on glory here.
21 So, --

22 **THE COURT:** You just --

23 **THE WITNESS:** Yeah. So here's what happens, okay?
24 There are other ways in which a suicidal person can get another
25 person to actually do the act. So, there's actually literature

1 on this.

2 In train engineers, people who drive like AmTrak
3 trains, where people have, quote-unquote, accidents on the
4 track, and there's literature of looking at how many of those
5 might be suicides and what are -- same thing, using the same
6 type of techniques that we use when we look at officer-involved
7 shootings.

8 Other things are single-person car accidents.

9 **THE COURT:** Well, these are the actual events.

10 **THE WITNESS:** Right. Oh, you're asking why.

11 **THE COURT:** The motivation would be, one, it's against
12 their religion.

13 **THE WITNESS:** Right. They don't want to stigmatize
14 the family.

15 **THE COURT:** All right.

16 **THE WITNESS:** What I have always said to any of my
17 patients who are suicidal is that we know that one of the
18 biggest risk factors for suicide is a suicide in the family.
19 Especially a first-degree relative.

20 Okay. So, people may choose to suicide by proxy, if
21 you will accept that term, in order to either not cast that
22 stigma or that increased risk on to friends and family members.

23 **THE COURT:** Do you have any -- you have offered a
24 variety of explanations, and the ambivalence could cover just
25 about anybody.

1 So, going back to the -- the -- you know, religious
2 one for just a moment, do we have any evidence in the record as
3 to whether Mr. Boyd or his family were observant in any
4 religion?

5 **THE WITNESS:** Do you want to speak to that? Or do I
6 speak to that?

7 **THE COURT:** Do you know?

8 **THE WITNESS:** Oh, yes. Yes. I mean, it's
9 something that I didn't --

10 **THE COURT:** I wasn't sure you -- was something you
11 had, one way or the other, in the record.

12 **THE WITNESS:** Yeah. I didn't comment on it in my
13 report.

14 **THE COURT:** I don't think you did.

15 **THE WITNESS:** No, I didn't. Although, it's certainly
16 something that I thought about. You can't put absolutely
17 everything in your report.

18 Here's the deal. Mr. Boyd was described by his mother
19 as being involved in a youth ministry that also involved music.
20 And there was some indication that she believed that he may have
21 pursued that as a profession, you know, as gainful employment.

22 So, of course, although I didn't mention it in my
23 report -- because, here's the thing. What I tried to do was
24 confine my report to evidence that came from Mr. Boyd, directly.
25 Okay. That I could tie to him directly.

1 And I didn't have a statement from him that said "I
2 want to be a youth minister and make lots of money," you know,
3 or "make my money that way."

4 **THE COURT:** What would you say is the definition of a
5 youth minister? What is a youth minister? To you.

6 **THE WITNESS:** To me, it could be a spectrum of things.
7 From somebody who leads a youth group within -- who's not
8 ordained, but who leads the youth group.

9 **THE COURT:** Within a church or other religious group?

10 **THE WITNESS:** Exactly. Or someone who is an ordained
11 minister. And I'm sorry, I didn't review this part of the file
12 in preparation for today. But Mr. Wiener may know of other
13 evidence of his religious beliefs.

14 **MR. WIENER:** Various family members who talked about
15 his desire to become a minister.

16 **THE COURT:** All right. Some indication that he had a
17 belief, and perhaps one that was more important in his life than
18 it might be in --

19 **THE WITNESS:** Right.

20 **THE COURT:** -- someone else's. Okay.

21 **THE WITNESS:** And, I may have been overly careful in
22 only including things in my report that I felt came from him,
23 directly.

24 **THE COURT:** Well, no, I think you -- you put a fair
25 amount of things in the report.

1 One of the things that had caught my attention, one of
2 the reasons I'm asking you about some of these matters, is that
3 there almost appear to be an inconsistency with one of your
4 opinions.

5 One of the bases for or motivation for suicide by cop
6 that you had described was -- actually, you had described it in
7 our discussion this morning, which is not yet afternoon,
8 fortunately. You had described it in connection with why one
9 might want to make it appear that it was not an outright
10 suicide. And, that was the idea of playing a cat-and-mouse game
11 and a mind game with the officer.

12 I think you might have said in your report that one of
13 the motivations just for suicide by cop in general is a desire
14 to cause distress or post-traumatic distress to the officer.

15 **THE WITNESS:** Uh-huh.

16 **THE COURT:** Yet the example that you gave in your
17 report, if I'm not incorrect -- I could quickly look at it --
18 was of someone who had left a note to be opened later that told
19 the officer, "Don't feel bad about it," you know, "This is the
20 only way I could think of to end my life," which seemed
21 inconsistent with the view that people are doing this in order
22 to cause distress to officers. But not all of them may be doing
23 it to cause distress.

24 **THE WITNESS:** Okay. That -- I put that note in my
25 declaration. And the reason why was I -- I didn't know what

1 your concerns were in this *Daubert* hearing. So the only reason
2 I put that in there was to demonstrate to you that suicide by
3 cop is a recognized phenomena. It wasn't something that I made
4 up.

5 **THE COURT:** Oh. In other words, this was somebody
6 admitting, essentially --

7 **THE WITNESS:** Yes, exactly. Exactly.

8 **THE COURT:** -- to having --

9 **THE WITNESS:** Exactly.

10 **THE COURT:** Okay.

11 **THE WITNESS:** But it wasn't something that
12 psychiatrists just dreamed up, that actually -- you know, that
13 is the absolute most clear example we have of intent. That
14 note. And all of us have a copy of it, you know, who work in
15 this field, you know.

16 **THE COURT:** As validation, direct validation of what
17 happened?

18 **THE WITNESS:** Absolutely.

19 **THE COURT:** And can happen.

20 **THE WITNESS:** Exactly. And we use it to educate
21 people that this is a real phenomena. And if a family member
22 says something, to take it seriously.

23 **THE COURT:** Okay. Now, I don't know if, Mr. Wiener,
24 you had other areas you wanted to cover. I can tell you what my
25 concern was in going into this hearing, and what I think has

1 been presented, in light of what we've done here, today.

2 All right. As I said at the beginning, I am -- and I
3 want to give Mr. Cunningham a chance to ask some questions, too.
4 But, just so that you know for your inquiry, I said from the
5 beginning I did not question it very strongly, I was happy to
6 hear more information on it, but I was assuming for purposes of
7 this discussion that there is a phenomenon recognized by others
8 than simply Doctor -- my mind just went blank.

9 **MR. WIENER:** Keram.

10 **THE WITNESS:** Keram.

11 **THE COURT:** -- Keram. I wanted to say Kramer. I knew
12 that was wrong. Okay, Keram. I knew that there was a general
13 recognition, or at least appeared to be such beyond this one
14 individual psychiatrist, of the phenomenon known as suicide by
15 cop. In other words, people who get somebody else to kill them.
16 And in particular, law enforcement.

17 What I was concerned about is her determination in
18 this instance that a suicide by cop had in fact occurred. And I
19 also was interested in whether the factors, to the extent that I
20 had them in the report and in her declaration, upon which she
21 relied -- I was interested in whether those were simply
22 something of an *ex post facto* construct, or whether this was
23 something that again is -- these are factors that have been
24 recognized, not just in Mr. Boyd's case, for example, but in
25 others as well, by people recognized and working in the field.

1 One of the things that I wasn't absolutely clear on in
2 advance, and still perhaps have not asked a question in this
3 regard, is the degree to which this opinion is being offered.
4 And, and also, is the opinion a diagnosis, or is it something
5 else? So I would like to clarify that.

6 And then I'm going to turn the matter over, I think at
7 this point, to Mr. Cunningham to ask some questions if he has
8 some, and then I will announce my view on the subject. Okay.

9 Because, I think that we've covered the factors that
10 Dr. Keram has relied on. And she has done a great deal to
11 describe for my benefit why some of the factors that might have
12 seemed to a layperson, which is myself, perhaps not in keeping
13 with suicide by cop, to be factors that cannot only be in
14 keeping but are perhaps emblematic of a suicide by cop.

15 And so, I don't think at this point I want to hear
16 more from you on that, unless there is something very telling
17 that you have there in your list of questions.

18 And while you are thinking about that, I would like to
19 ask the Doctor, is the opinion you are offering something that's
20 described in your field as a diagnosis or as something else?

21 **THE WITNESS:** I wrote two opinions in my report. And,
22 you know, I'm prepared to testify to both of them. One was
23 about his diagnosis. And the other is whether or not, in my
24 opinion, this was a suicide by cop.

25 **THE COURT:** All right.

1 **THE WITNESS:** Suicide by cop is not a diagnosis. It's
2 a method of suicide.

3 **THE COURT:** Okay. And is it fair to say you were
4 essentially, then -- you know, I don't want to put you on the
5 level of an auto accident reconstructionist, but you are
6 reconstructing, to a certain extent, the mental state of someone
7 that resulted then in the event that occurred.

8 **THE WITNESS:** Correct. And, could I expand on that?

9 **THE COURT:** Sure.

10 **THE WITNESS:** Psychiatrists and forensic psychiatrists
11 are frequently asked to do what we broadly call retrospective
12 mental state examinations. Probably the most common context in
13 which they occur are in insanity defense evaluations, in which
14 we're asked to reconstruct somebody's mental state at the time
15 of the commission of the offense.

16 And, we may be looking at that issue anywhere from
17 days to years -- and I just did a case where the crime was
18 committed in 1993, so I was looking back about 14 years. This
19 guy recently confessed. So, that's probably the most common.

20 But we also do them in cases of testamentary capacity
21 -- retrospective testamentary capacity. Sometimes we get
22 referred the person to determine that they're competent to make
23 their will, while they're still alive, if there is a concern
24 that they have. Like if they have a much younger wife and older
25 children, for example.

1 So, you know, there are recognized procedures. And
2 these -- this type of evaluation is very old, because the
3 insanity defense is very old.

4 **THE COURT:** Okay. And so, this falls into that type
5 of analysis.

6 **THE WITNESS:** Yes, correct.

7 **THE COURT:** Okay. Then, are you giving an opinion to
8 a reasonable degree of medical certainty? Or what is the level,
9 then, to which you are offering?

10 **THE WITNESS:** Well, I will tell you that it is my
11 opinion to a reasonable degree of medical certainty that
12 Mr. Boyd committed a suicide by cop.

13 **THE COURT:** All right. Now, I think it would be
14 appropriate to turn the questioning over to Mr. Cunningham, and
15 then to have you come back if you need to.

16 **MR. WIENER:** Can I ask one clarifier?

17 **THE COURT:** Sure.

18 **MR. WIENER:** Excuse me, Your Honor.

19 **BY MR. WIENER:**

20 **Q** With respect to the testamentary capacity cases, I think
21 you -- you referred to situations in which they are still alive?

22 **A** Yes.

23 **Q** But, is the method you just described also applied to
24 situations in which someone dies, the will is in probate, and
25 you have to opine as to testamentary capacity of the deceased

1 person who wrote the will?

2 **A** That's the more common type of testamentary capacity
3 evaluation we do.

4 **THE COURT:** I assumed that was what you were talking
5 about. The person's gone, and now the family's cut out of the
6 will, and the --

7 **THE WITNESS:** Uh-huh. Uh-huh.

8 Your Honor, may I take a very brief break?

9 **THE COURT:** Yes. Tell you what. Why don't we take
10 ten, is that agreeable? Come back at 10:00, or a little after,
11 and we will take up Mr. Cunningham's questions. Very good.

12 Thank you. And you are free to step down whenever you
13 like.

14 **THE WITNESS:** Thank you very much.

15 (Recess from 10:54 to 11:06 a.m.)

16 **THE COURT:** All right. Dr. Keram, take the stand,
17 please. I was thinking of some other things, and I'm going to
18 pass for a moment and let Mr. Cunningham go ahead.

19 **MR. CUNNINGHAM:** All right, Judge. You do stop me at
20 any time.

21 **THE COURT:** No, that's all right.

22 **MR. CUNNINGHAM:** But, you know, if it's easier --

23 **THE COURT:** Okay.
24
25

KERAM - CROSS EXAMINATION / CUNNINGHAM

CROSS EXAMINATION

BY MR. CUNNINGHAM:

Q Good morning, Dr. Keram.

A Good morning, Mr. Cunningham.

Q My name is Dennis Cunningham. I'm here as a pinch-hitter for the Plaintiffs. So, I'm trying to be a quick study, if you will, and -- and, please help me out if I'm off-beam.

I just want to get an idea, I think the Court just referred to the notion, this is -- suicide by cop is not a diagnosis of any kind in the psychiatric field, it's an explanation for an event or a phenomenon, right?

A You could compare it to suicide by gunshot wound, suicide by hanging. It's the method of suicide.

Q And, not anything more than that, would you say, then? It doesn't have a philosophical overlay in the sense of where the practitioner has to come from in trying to analyze it?

A It depends on what the practitioner's role is in the case.

As a clinician, when I have patients who are contemplating committing a suicide by cop, I try to help the person help me understand what their reasoning is behind both the suicide and the suicide by cop, in order to individually tailor a treatment plan to get them not to do it.

Q Uh-huh.

A So their philosophies may be quite different in terms of why they're picking a suicide, why they're choosing suicide by

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1 cop, and how I can best intervene to make them not want to do
2 that.

3 **Q** Okay. And, is it right to say that this is a fairly new,
4 fresh field in the psychiatric area? I know you have referred
5 to a case that you found that was back in the 18th century, but
6 as far as some systematic study of it that's aimed at trying to
7 pin down a phenomenon that can be identified with expertise and
8 certainty, that would qualify as evidence?

9 **A** I wouldn't consider it to be -- I think your word was
10 "fresh." The -- the phenomena of victim-precipitated homicide,
11 as I said, was first described in 1959. And so you do see in
12 the literature going back that far -- which is now getting
13 harder and harder to access -- that there are mentions of people
14 who provoke their deaths by law enforcement officers.

15 As I mentioned earlier, the term "suicide by cop" was
16 coined in around 1984. And the literature that reflects actual
17 study of the phenomena begins well over ten years ago.

18 **Q** Okay. I guess that's my point, is, as a subject of study
19 and isolating as a phenomenon that can be studied, that's a
20 ten-year-old deal?

21 **A** Approximately, yes.

22 **Q** And, have you had a number of cases in which you were
23 called upon to give an opinion, retrospectively, where the
24 person has passed away, as to whether or not this was suicide by
25 cop?

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1 **A** I have been asked to evaluate that in two contexts. One
2 was in a research project that a northern California law
3 enforcement jurisdiction asked me to do. And the other is in
4 the context of civil litigation.

5 **Q** Uh-huh. And, how many civil cases have you worked on where
6 this was an issue?

7 **A** You know, I don't keep count of the different types of
8 cases that I've done, but maybe a dozen. That would be a rough
9 estimate.

10 **Q** And of those, were there particular ones where you were or
11 were not certified as an expert, and testified in court, with a
12 jury?

13 **A** Only one of those cases went to trial. The majority were
14 either dismissed on summary judgment, or settled. And, in the
15 case that went to trial, I was qualified as an expert by the
16 judge.

17 **Q** And you did testify, then?

18 **A** Correct. I don't recall if that case -- most of these are
19 the 1983 -- I want to say '83 or '85, you know, the federal
20 cases. But I -- I can't recall. It may have been a state case.

21 **THE COURT:** 1983.

22 **THE WITNESS:** Okay. Thank you.

23 **BY MR. CUNNINGHAM:**

24 **Q** And was your opinion in that case that there had been a
25 suicide by cop?

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1 **A** Yes. There had been cases in which I felt it wasn't a
2 suicide by cop, but those didn't proceed to trial.

3 **Q** I understand. Roughly, if you know, how many other
4 practitioners are engaged in this specific study, have worked on
5 this problem?

6 **A** Before I answer your question, I need to correct. I'm kind
7 of a stickler for details. And so, even though this might not
8 be relevant in the least, I just want to correct the Record.

9 **Q** That's fine.

10 **A** One of the cases to which I was referred with the specific
11 question as to whether or not this was a suicide by cop, I said
12 no. But it did proceed to trial, and I was asked to testify
13 about whether or not the decedent had been dangerous. So, it
14 was a violence risk assessment. Yeah.

15 Now I don't have to stay up and night thinking that I --
16 you know, in Federal Court, have something that's not true.

17 **Q** Okay.

18 **A** So, okay. There are -- there are probably -- oh, I don't
19 know, maybe -- I mean, at the conference that we had with
20 suicide and law enforcement, there were maybe 50 people there.
21 And most of them had worked in the area of suicide by cop. In
22 the psychiatric and psychological research community, there are
23 probably over a dozen people who study the area. Some publish,
24 some don't. And then there are a number of law enforcement
25 officers, also, who work in the area.

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1 Q Studying that?

2 A Uh-huh.

3 Q And there is at least this beginning body of literature on
4 the subject. I think you said there were four studies out now
5 that are recognized? Is that right?

6 A No, there are more than that on suicide by cop.

7 Q Okay. And, the one that you discussed, the Hutson, is it
8 fair to say that's the main one now, or the most substantial
9 one?

10 A It's the largest one in terms of the number of subjects
11 that they looked at. But other studies provided information
12 about other aspects of the phenomena. So -- it's the main one
13 in terms of probably what psychiatrists would call demographic
14 information or descriptive information about the events.

15 But then there are other studies that look more at motive,
16 say, for example, or method of the event.

17 Q Okay. My notes say that you have said 430 to 440 -- or 437
18 shootings that were included in the L.A. Sheriff's Office study?

19 A Correct.

20 Q And how many of those were thought to be or thought to
21 possibly be suicide by cop?

22 A It was eleven percent, so, I think it was about 40
23 shootings.

24 Q That -- where this possibility was raised?

25 A Where the researchers felt that the file indicated that the

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1 person or the event met their four selection criteria.

2 Q And, and then they would look at each case according to the
3 criteria, and go wherever they went with the studies?

4 A Right, exactly. They were collecting a large number of
5 data points. And we actually replicated that exact study.

6 Q Uh-huh.

7 A With a little bit of a different twist on it.

8 Q Okay. And, and you talked about the selection criteria. I
9 take it that those would be more or less analogous to elements
10 of a determination that suicide by cop had occurred.

11 Is that fair? I mean, maybe --

12 A We went through this in the morning.

13 Q I might be borrowing a legal type of term there, but --

14 A The only thing I can say is, this is -- I really enjoy
15 working sort of with the interface of different fields. But
16 really, what the researchers were doing was trying to just
17 develop what we call selection criteria for inclusion in the
18 study, so that when they looked at the subjects that they pulled
19 up, they felt very confident that those were, indeed, suicides
20 by cop.

21 Q Because that criteria had been met in each case?

22 A Correct.

23 Q All of them?

24 A Correct.

25 Q Okay. So --

KERAM - CROSS EXAMINATION / CUNNINGHAM

1 **A** Now, they -- because they had such tight criteria, when you
2 develop selection criteria, you want them to be at a higher
3 threshold than, say -- you want beyond a reasonable doubt, you
4 know.

5 **Q** Okay.

6 **A** So, we know that we are excluding cases that may in fact
7 meet the definition.

8 **Q** Would meet the definition without meeting each of those
9 four criteria?

10 **A** Right. I shouldn't have said met the definition. That may
11 have, in fact, been suicides by cop, or whatever it is that
12 you're trying to isolate.

13 **Q** Okay. But this is not -- just to sum up this part of it,
14 we're not talking about something where there's a tremendous
15 volume of study and experience, such as with PTSD or something
16 like that, that's been developed over a larger time with a lot
17 more people involved in it. Right?

18 **A** Compared to the PTSD literature, there is less literature
19 than there is in suicide by cop.

20 **Q** Okay. If -- if we look at those four criteria that you
21 have discussed, the evidence of the intent risk factors, do
22 risk -- when you discuss risk factors, that -- that equate -- am
23 I right to say that equates to the indicia of the intent, right?
24 Whatever they might be?

25 **A** Correct. Yes.

KERAM - CROSS EXAMINATION / CUNNINGHAM

1 Q Okay. And that are detectible in some concrete way,
2 retrospectively, after the event?

3 A Correct.

4 Q And, and in that respect, when you are analyzing a case
5 like this, you are also dealing with different versions, I take
6 it, of what the event was. What happened, what was said, what
7 the gestures were, all that kind of stuff. Correct?

8 A Yes.

9 Q And how do you select which versions that you follow in
10 making your analysis, in a given case such as this?

11 A Uh-huh. I think of it as trying to provide the best
12 explanation for the evidence as it stands. There may be things
13 that contradict what you end up thinking is the best
14 explanation. It's rare that every single piece of -- especially
15 when you are looking at lots of eyewitnesses, or, say, in a
16 clinical case, you know, all of the data that -- of the
17 patient's chart.

18 Q Uh-huh?

19 A But what you're trying to do is create the most consistent
20 diagnosis or scenario or explanation. And recognizing,
21 absolutely, that there will be factors or evidence or symptoms
22 or whatever, that -- that may either not support or -- you know,
23 be neutral, or directly contradict your opinion.

24 Q Uh-huh. And, and in giving the opinion, then, how do you
25 allow for that problem? I mean, you had to choose one version

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1 or the other, right?

2 **A** Yes, correct.

3 **Q** To undergird the opinion.

4 **A** Correct.

5 **Q** Do you then qualify the opinion? If this is true -- you
6 know, if he said so and so, yes; if he said such and such, no?

7 **THE COURT:** I want to make sure that you and the
8 witness are on the same question. All right?

9 I understand Mr. Cunningham's question to be where
10 there are disputed facts, how do you deal with the fact that
11 there are disputed facts?

12 **THE WITNESS:** Uh-huh.

13 **THE COURT:** In other words, are you asked by, for
14 example, Mr. Wiener to assume a certain set of facts to be
15 correct, and give your opinion, and then you can also say, well,
16 what if such and such wasn't the case, what if it was like the
17 other witness said, would that change your opinion, or things
18 like that.

19 **THE WITNESS:** Uh-huh.

20 **MR. CUNNINGHAM:** Right.

21 **THE COURT:** I wasn't sure that you weren't doing the
22 following, that you were thinking that he was asking you if you
23 have an opinion, based on the facts -- and there are certain
24 facts that are not necessarily disputed, but just may not
25 support your opinion, that -- how do you deal with it?

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1 And so, those are two different questions.

2 **THE WITNESS:** Uh-huh, correct.

3 **THE COURT:** One is you have disputed facts, and do you
4 simply accept one set of facts because you're asked to do that,
5 and form your opinion on it.

6 The other question is, let's say there's undisputed
7 facts, but some of the facts are less indicative of whatever the
8 opinion is that you arrived at, what you do with that. So,
9 those are two different questions.

10 And I'm not sure, which one were you thinking he was
11 asking?

12 **THE WITNESS:** I may have misunderstood, but I thought
13 the second.

14 **THE COURT:** And I think he's asking the first.

15 **MR. CUNNINGHAM:** I thought -- I was more thinking of
16 the first. I'm sorry if I wasn't clearer.

17 **THE COURT:** No, that's okay. That's why I honed in on
18 this.

19 **MR. CUNNINGHAM:** I mean, maybe we should get them
20 both, Judge, you know, in terms of trying to pin this down.

21 **THE COURT:** That's fine. I think she's answered the
22 second, --

23 **MR. CUNNINGHAM:** Yes.

24 **THE COURT:** -- which is that she considers them and
25 decides whether it changes her opinion, or whether it's a factor

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1 that isn't so strong to change her opinion.

2 On the other -- ordinarily, witnesses are told to --
3 pretty much to assume certain facts, because if you have
4 disputed facts, for example, if someone says "I was going 30
5 miles an hour," and somebody says "They were going 50 miles an
6 hour," your opinion may be to decide how fast they were going,
7 or, your opinion may be to assume that the person was going
8 30 miles per hour, and then give an opinion based on that.

9 **THE WITNESS:** Yeah.

10 **THE COURT:** And then, somebody might ask you whether
11 your opinion would be different if you assumed the contrary,
12 that it was 50.

13 **A**

14 **THE WITNESS:** Right.

15 **THE COURT:** So, here we have certain facts in dispute.
16 When his hands were up, when his hands were down, did he say
17 this, did he say that.

18 So then the question is, in this case, perhaps, did
19 you -- were you asked to assume certain facts to be true?

20 **THE WITNESS:** Yeah, I think -- I think what happens,
21 usually when I do a forensic case, and certainly in this case,
22 is the two questions you asked me happen chronologically, only
23 in reverse order.

24 I go through all the things that I have, and I form my
25 opinion. And, I send my report in. And then, either at

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1 deposition or at trial, somebody will say, "Did you assume this?
2 Did you assume that? Well, what if it isn't present?"

3 And then I have to think, well, what if it isn't
4 present? Then I have to answer the question.

5 **BY MR. CUNNINGHAM:**

6 **Q** Uh-huh. But you don't do that operation at the stage of
7 writing the report.

8 **A** Sometimes I do. Like, for example, in this case -- well, I
9 think I qualified it, actually. There's some concern about
10 whether or not, indeed, Mr. Boyd was the person who was present
11 at the Tiffany Williams incident. And so, you know, I think --
12 and there were other things like that.

13 So, usually, my report, I said assuming this is the case,
14 then -- you know.

15 **Q** Uh-huh, okay. All right. All right. So --

16 **A** I was careful to -- you know, to try to designate that.

17 **Q** Uh-huh.

18 **A** Yeah.

19 **Q** All right. I apologize. I went through the report very
20 quickly and I haven't, I know, plumbed all of its detailed
21 wisdom.

22 But I'm thinking here, and also on the lines of the Court's
23 inquiry earlier, that specifically with -- or particularly with
24 respect to this intent, which I take it, I mean, that's more or
25 less the most important factor when you are trying to analyze

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1 this, right? What do we have to show that this is what the
2 person was trying to do.

3 **A** Uh-huh.

4 **Q** And, so, there, I take it, you would also have to focus
5 carefully on ambiguities in the evidence, or possible
6 conflicting versions of the evidence.

7 **A** If they affected intent, certainly. Yes.

8 **Q** Like, for example, where there's apparently testimony -- I
9 think I know of this -- that the independent witness and one
10 officer said that he said something after he got -- or about the
11 time he got out of the car or -- I'm not sure if it was before
12 or after he got out of the car, "You can just go ahead and shoot
13 me now."

14 **A** Yes.

15 **Q** Now, that's a statement, in and of itself, that could be
16 made with different intent, correct?

17 **A** Absolutely.

18 **Q** That could be sarcastic, right?

19 **A** Absolutely.

20 **Q** It could be hostile, and just challenging in a way that had
21 nothing to do with wanting to be killed, fair?

22 **A** Absolutely.

23 **Q** So, that's something you would have to assign to the
24 ambiguous section of the evidence that you are analyzing, right?

25 **A** You could certainly do that.

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1 Q And, whereas, I take it, that -- well, would you find the
2 same ambiguity in the fact that he had apparently shot at the
3 police in the -- in the course of this pursuit that had just
4 ended?

5 A Well, yeah, I looked at any -- what I tried to do was think
6 of the different possible explanations for his behavior.

7 Q Uh-huh.

8 A And so, I considered the fact that -- given he was under
9 the influence of the MDA, that he may have been psychotic at the
10 time. That, either acute intoxication -- psychotic from an
11 acute intoxication, or a long-standing use of a hallucinogen can
12 lead to psychosis.

13 Q I'm sorry?

14 A A long-standing use, yeah. I didn't mean to say
15 "hallucinogen" -- of amphetamine-like substances can lead to a
16 permanent psychosis.

17 Q Uh-huh.

18 A So, I did address that in the report, in terms of trying to
19 explain various behaviors with other hypotheses. But in the
20 end, I didn't -- so, I guess, you know, to answer your question,
21 yes. I did -- I did consider that that might have been an
22 ambiguous event.

23 Q The possibility of psychosis, in and of itself, with or
24 without the drugs, would not necessarily support suicide by cop,
25 right? As opposed to some other kind of antisocial behavior

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1 that he -- or antisocial motive, and intention that he may have
2 been acting on at this time.

3 **A** There are known cases of psychotic individuals provoking
4 suicides by cop.

5 **Q** I'm sure that's true. But there -- there are certainly
6 known cases of psychotic individuals reacting hostilely, with
7 hostility or confrontatively with cops, where they weren't
8 trying to get killed; they had something else on their mind,
9 trying to kill a cop or whatever?

10 **A** I'm sure there are. I don't -- you know, because I'm sort
11 of, you know, referred cases that are --

12 **Q** I understand.

13 **A** Yeah, I haven't seen any of those yet. But they probably
14 do exist.

15 **Q** And that, again, is an ambiguity in the evidence of intent
16 in this case. Correct? The shooting.

17 **A** That, meaning shooting at the police?

18 **Q** Yes.

19 **A** Yes. Yeah. I mean, ambiguity in -- I hate getting into
20 what the definition of "is," but I'm kind of like that. You
21 know, if you mean by "ambiguity" that there could be possible --
22 that there could be more than one explanation for it?

23 **Q** Yes.

24 **A** Yes.

25 **Q** And contrary explanations, with respect to the specific of

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1 suicide by cop.

2 **A** Yes.

3 **Q** Okay. And, and, you and the Judge discussed the subject of
4 the -- of -- apparent attempt to take a hostage.

5 **A** Yes.

6 **Q** And, and as reflected in the evidence in this case --
7 primarily, I take it, from Ms. Hogan's deposition, right? And
8 her account of that event?

9 **A** Yes.

10 **Q** Is that where you got that?

11 **A** There were other witnesses, yes.

12 **Q** Uh-huh. And, I agree with you, the evidence on the earlier
13 incident -- I forgot that woman's name, Williams, is that --

14 **A** Yes.

15 **Q** That certainly -- I mean, it's ambiguous as to what
16 actually took place, let alone what the intention was, correct?

17 **A** Well, not that it didn't -- it's not ambiguous that it took
18 place. It's ambiguous that it was Mr. Boyd.

19 **Q** Uh-huh.

20 **A** Yeah. I should say, it's not definite that it's Mr. Boyd.

21 **Q** Well, with respect to Ms. Hogan, is it your -- well, is it
22 your opinion, or was it your determination in looking at the
23 evidence, that this was in fact an attempt to get a hostage in
24 the process of setting up a suicide-by-cop situation?

25 **A** It's my opinion that the interaction with Ms. Hogan was an

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1 attempt to bring himself to law enforcement attention. It's --
2 I can say that to a reasonable degree of medical certainty.

3 Q Uh-huh.

4 A And he did that by appearing to intend to have her enter
5 his car. As I said earlier about this incident -- I think it
6 was about this incident -- I'm not a mind-reader. So I don't
7 know if he really intended to get her into his car or not.

8 It's my opinion that he intended to make her believe and
9 the police believe that he wanted her in the car.

10 Q Was there not some evidence which might also suggest that
11 he wanted to get ahold of her car, and change cars, himself?
12 Get her out of her car and --

13 A Yes, yes.

14 Q So that would be another explanation at variance with
15 the --

16 A Yes.

17 Q -- opinion.

18 A Yes.

19 Q Is there anything else about the -- I'm sorry. The point
20 about attempting to take a hostage, I think you're saying, is
21 the -- is the -- the function of it is to bring yourself to law
22 enforcement attention, get the cops involved.

23 A Correct.

24 Q In -- in that context of trying to get killed by the cops,
25 at least.

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1 **A** Correct.

2 **Q** So, it's -- I mean, my problem there is that it kind of
3 reads bad -- it's kind of tautological, isn't it, that if he's
4 saying that that's why he was doing it, he was doing it because
5 he wanted to -- he -- I'm making the interpretation that he was
6 trying to take a hostage, and he was doing it in order to get
7 the cops after him so that he could set up a situation where he
8 could get shot, as opposed to a different interpretation of what
9 he was trying to do, and a different interpretation of why he
10 was doing it, and a different interpretation of what his
11 ultimate intent was.

12 **A** Well, I think what psychiatrists do, whether we're
13 confronted with a patient with a set of symptoms and we're
14 comparing it to the diagnostic criteria for a diagnosis, or
15 whether we're looking at known characteristics of suicide-by-cop
16 scenarios and we're presented with a file with a lot of
17 information, is to review that file with the characteristics of
18 suicide-by-cop scenarios in mind, and see -- its like a Venn
19 diagram. Is there an overlap, or not?

20 **Q** Uh-huh.

21 **A** So the way I would answer that question is no, it's not
22 tautological at all. That's not how we approach it. We don't
23 -- "tautological" to me means -- circular reasoning?

24 **Q** Right.

25 **A** Yeah. It's not circular reasoning, at all. It's

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1 evaluating a known -- evaluating the information that you have
2 regarding the event against the known characteristics of suicide
3 by cop events and seeing if they match, and to what degree they
4 match.

5 **Q** All right. And, and in that context, at least, obviously
6 the person bent on suicide by cop has to bring the cops to him
7 to begin with.

8 **A** If it's a premeditated suicide by cop. There are other
9 categories of suicide by cop, in which a person --

10 **Q** Okay, that rise on the spur of the moment?

11 **A** Well, the -- there are two other categories. One are the
12 person who is suicidal before the arrival of law enforcement.
13 And then there's a suicide-in-progress call, so, the
14 suicide-by-cop plan develops on the scene, but the suicide
15 ideation, intent, and an alternate plan has already begun.

16 **Q** Uh-huh.

17 **A** The other is the person who doesn't mean to draw himself to
18 law enforcement attention, and is not suicidal, and doesn't have
19 a suicide-by-cop plan before they come to law enforcement
20 attention, but who, when confronted with law enforcement,
21 develops both suicidal ideation, with a suicide-by-cop plan as
22 the method.

23 Mr. Boyd doesn't fall into either of those categories.

24 **Q** Okay. But some, where it arises because he's cornered, and
25 then it comes to this --

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1 **A** Correct. It's my opinion that he does not fall into either
2 of those categories.

3 **Q** And, if we're following these factors, and using them as
4 the indication that this is suicide by cop (Indicating)?

5 **A** Correct.

6 **Q** And, and, let's see if there's anything -- the other items
7 that I think you mentioned as showing the intent -- the
8 statement "You can shoot me now," the shooting at the cops,
9 noncompliance with the commands that they made -- this is after
10 the car was stopped and he gets out? Is that right?

11 **A** I'm trying to think if there were commands before -- yeah,
12 I mean, there were commands before he gets out of the car, as
13 well, so it's -- you know, from the time the officers start
14 yelling commands at him.

15 **Q** But the command then was "Get out of the car," right, and
16 he got out?

17 **A** Yes, yes.

18 **Q** So, that's -- there's compliance. I mean, we're talking
19 about compliance, and we're talking about it in the context of
20 either suicide by cop or an attempt to surrender, right?

21 Generally speaking, that's the dichotomy we are dealing with
22 here, right?

23 **A** And there may be other possibilities that we haven't
24 thought of, as well.

25 **Q** Uh-huh. Are you thinking of any of them now?

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1 **A** No.

2 **Q** Okay. And I can't think of any, either --

3 **A** Yeah.

4 **Q** -- in the context of the case, or the issue that we're
5 facing here --

6 **A** Yes.

7 **Q** -- that, that -- and let me ask you this. In arriving at,
8 and holding, and maintaining, and then coming to court and
9 swearing a mighty oath, and telling the jury that you believe
10 that they should conclude that this was suicide by cop and not a
11 botched surrender attempt, or a place where the cop, you know,
12 lost his cool and did something too quick, or whatever
13 alternative set of explanation -- or explanation is involved in
14 the alternative facts, right?

15 This is -- so, in that respect, then, then, is it fair to
16 interpret all -- interpret the actions that you know of that he
17 made, in terms of the commands, as escalating the confrontation?

18 **A** Absolutely.

19 **Q** And, and why do you say that?

20 **A** Because -- and every researcher on suicide by cop
21 emphasizes this point. There -- every suicide-by-cop event
22 needs to be evaluated by looking at the sum total of the
23 behaviors in that event.

24 So, you can't divorce his actions before and after the --
25 you know, any one particular behavior on his part, in order to

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1 arrive at your opinion about whether or not it's a suicide by
2 cop.

3 Q Well --

4 A So, if you look at the pattern of his behavior, it's an
5 escalation.

6 Q Uh-huh. An escalation, along the track of accomplishing
7 the purpose of suicide by cop?

8 A Toward that goal. It's an escalation of -- of increasing
9 threat perceived by law enforcement officers, and decreasing --
10 well, increasing length of time of the event as well, you know,
11 so the officers aren't sure what's going on.

12 Q Building up the pressure on the officer?

13 A Well, not bringing the event to a conclusion. I don't know
14 if it's fair to say "building up the pressure," but keeping them
15 in that situation.

16 Q Okay. Okay. Did you -- in this context, did you determine
17 that it was not true that he had a problem with getting on the
18 ground?

19 A I saw in the Oakland Police Department report -- and I was
20 very careful to check to make sure those reports were written on
21 the same day, on the 2nd, and they were written on the 2nd. So
22 it's not like, you know, Oakland went to help their
23 San Francisco buddies, you know.

24 So, assuming those were original reports, and dated
25 correctly, --

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1 **THE COURT:** Interesting cross-check on your part,
2 actually.

3 **THE WITNESS:** I'm very suspicious.

4 **THE COURT:** You were concerned that, having once heard
5 there was a shooting, --

6 **THE WITNESS:** Yes.

7 **THE COURT:** -- the Oakland police may have changed
8 their report to --

9 **THE WITNESS:** Yes, absolutely.

10 **THE COURT:** Or made a report --

11 **THE WITNESS:** Absolutely, yeah.

12 **THE COURT:** Interesting.

13 **THE WITNESS:** Yeah. So, I mean, I have my own level
14 of paranoia. And I hope all of us experts do, you know.

15 **THE COURT:** Well, that's fine.

16 **THE WITNESS:** So, --

17 **MR. CUNNINGHAM:** Built-in.

18 **THE WITNESS:** So, there were many officers who
19 described Mr. Boyd getting out of the car, and one said "Laying
20 down on the street," one said, I think, "Spontaneously proning
21 himself." I think that was an Oakland officer who said that.
22 So, I assumed that he could, yes.

23 Also, I have to say, you know, working in the VA, I
24 treat a large number of amputees and double-amputees, you know.
25 And they -- they don't have any trouble doing that. And these

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1 are BKA -- I mean -- yeah, BKA amputees like Mr. Boyd was.

2 **THE COURT:** BKA?

3 **THE WITNESS:** Sorry. Below the knee. Below-the-knee
4 amputees. There's above-the-knee amputees, and below-the-knee
5 amputees.

6 **THE COURT:** He is a below?

7 **THE WITNESS:** A below-the-knee amputee. But also,
8 above -- I mean, I don't know why I made that distinction.
9 Above-the-knee amputees as well, so --

10 **THE COURT:** Okay.

11 **BY MR. CUNNINGHAM:**

12 **Q** Uh-huh. So, it was based on your -- your analysis of the
13 Oakland reports that made you think that there's something fishy
14 about a hesitation that was reported on getting to the ground?

15 **A** Well, it was two things. It was that the Oakland Police
16 had observed that exact behavior three days before, and it was
17 knowing -- you know, working with a large number of amputees,
18 given that I work with war veterans.

19 **Q** So you were just inherently suspicious of the notion that
20 he would have a problem?

21 **A** I think that's fair to say. Yes.

22 **Q** I mean, suppose he might have had an abscess in one of his
23 legs, and he had some pain in it or something like that. Would
24 that cause him to hesitate?

25 **A** Well, first of all, we looked at the autopsy report. Or I

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1 shouldn't say "we," I don't know who "we" is. It's me.

2 I looked at the autopsy report. And, you know, if you look
3 at the scene of the leg, there were only minor problems, that
4 shouldn't have caused mobility issues.

5 **Q** Okay. Okay. And what about the possibility that he was
6 being given contrary commands by different officers at the same
7 time?

8 **A** That's not un- -- well, okay. First of all, that's not
9 uncommon. But not necessarily contrary. I mean, usually what
10 people are told is "Show me your hands," you know, "Keep your
11 hands up, keep your hands out, and get on the ground."

12 And those things aren't really contrary.

13 **Q** Well, if you needed -- if you thought, or if you needed --
14 if you thought, because you're an amputee, you thought you
15 needed to brace yourself down with your hands, and you're told
16 to put your hands in the air, then you're being told two things,
17 right? "Get down" and --

18 **A** Yeah, but you know, I can't -- I can't tell you the number
19 of cases that I've worked on where people were told both those
20 things and did, you know, one or the other, and stayed in one or
21 the other of those positions.

22 **Q** Uh-huh. Okay.

23 **A** So, I didn't -- I did not consider the fact that he was --
24 or he may have been given commands for two different things to
25 be significant in terms of the way he did act later. You know,

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1 after those -- or while those commands were being made.

2 Q I'm sorry, the way he acted while the commands were
3 being -- according to --

4 A What was important to me was that he wasn't obeying either
5 one of those commands.

6 Q Well, he had his hands in the air, didn't he (Indicating)?

7 A He didn't keep them in the air, though.

8 Q Let me back up for a minute. When you're talking about
9 this particular sequence, from the time that he opens the door
10 and gets out of the car to the time he's shot, are you -- are
11 you dealing with different versions of what happened there? Or
12 is it one consistent version?

13 A No, there are different versions.

14 Q And, what is your version, as a result of the study of the
15 different versions?

16 A The assumption that I made was that he came out of the car,
17 law enforcement had their weapons drawn on him, and were
18 shouting commands at him. And, it appears that he raised his
19 hands and then lowered them towards his waistband (Indicating),
20 at least one of them.

21 He may have taken off his shirt. It's not clear. He may
22 have made a 360-degree turn. At some point, he made a statement
23 that Officer Elieff and Mr. Campos heard, you know, "You can
24 just go ahead and shoot me."

25 And then he sat on the floorboard of the vehicle, and

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1 reached into the vehicle, I believe with his right hand
2 (Indicating), and came out.

3 Now, when he came out, one of the officers -- I think it
4 was O'Malley -- described him as seeing -- seeming to be dazed.
5 But then, his demeanor changes, and he appears much more
6 focused, as if, you know, he's -- he's not dazed any longer.
7 And then he reaches in with more deliberation (Indicating).

8 And at that point, Officer Pierce had come abreast of him
9 and had a good view, an unobstructed view of him. And as he
10 went in -- I don't know if he was on his way out, exactly what
11 point in that motion -- Officer Pierce shot him.

12 **Q** Officer Payne?

13 **A** Payne. I'm sorry. P-A-Y-N-E.

14 **Q** I'm just wondering if there was a third officer there.

15 **A** I think there was a Pierce Street in the pursuit.

16 **THE COURT:** Yeah, there was.

17 **MR. CUNNINGHAM:** No problem.

18 **THE COURT:** Let me just ask you, how many more
19 questions do you think you have here, Mr. Cunningham?

20 **MR. CUNNINGHAM:** Not a whole lot, Judge.

21 **THE COURT:** Let me just tell you that I hadn't
22 intended this to be an open opportunity for discovery. Okay.
23 In other words, --

24 **MR. CUNNINGHAM:** I can understand that.

25 **THE COURT:** We're not really here to just simply test

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1 the witness's opinion on cross-examination, which of course will
2 be certainly available if the witness is allowed to testify.

3 **MR. CUNNINGHAM:** Uh-huh.

4 **THE COURT:** But really, the more basic question of
5 whether the witness's testimony would meet the standards that
6 are required, under the *Daubert* test --

7 **MR. CUNNINGHAM:** Uh-huh.

8 **THE COURT:** -- Kumho Tires, since this isn't perhaps
9 the question --

10 **MR. CUNNINGHAM:** Scientific, right.

11 **THE WITNESS:** It is Kumho, yes, that's --

12 **THE COURT:** And I'm a little concerned that we may
13 just go on at some length. One of the questions that did come
14 up and has answered one of my questions was the effect of drugs,
15 which I had neglected to ask.

16 And I also had one other question that I just wanted
17 to pose, which is, my understanding is, I don't believe he ever
18 sought professional help, Mr. Boyd, before this.

19 **THE WITNESS:** No, that's not true.

20 **THE COURT:** Is that --

21 **THE WITNESS:** He had psychiatric treatment, and there
22 are psychiatric records.

23 **THE COURT:** Oh.

24 **THE WITNESS:** But, the Plaintiff's attorney made a
25 motion to have those, I guess -- I don't know if "excluded" it

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1 is right word. So, I don't have access to those, even though I
2 asked for them.

3 **THE COURT:** I see. All right. Now, that, I was not
4 aware of. So, you do not know whether those records contain,
5 for example, any expressions of despondency or suicidal ideation
6 of any sort.

7 **THE WITNESS:** Correct.

8 **MR. CUNNINGHAM:** Uh-huh.

9 **THE COURT:** All right. I believe we do not have any
10 testimony or record that he made comments of that nature,
11 however, to any -- just friends or family. Would that be --

12 **THE WITNESS:** That's my understanding. I have to say
13 that in preparing for this hearing today, I prepared with the
14 knowledge that I had to test my opinion against the *Daubert*
15 issues.

16 **THE COURT:** Yes.

17 **THE WITNESS:** So I didn't review the -- excuse me. I
18 didn't review the entire file again, as I had done back, you
19 know, January, February, Mar- -- so --

20 **THE COURT:** Well, assuming there were no -- that
21 there's no evidence, at least in the lay records, so to speak,
22 of making those kind of comments, does that -- does that comport
23 in any way with the history of suicide-by-cop participants, so
24 to speak? That either is recognized in literature or otherwise?

25 **THE WITNESS:** Right. The literature is not -- the

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1 literature recognizes that there are a proportion of -- not only
2 in suicide-by-cop cases but other suicides, other types of
3 suicides -- that there are people who do not make statements of
4 suicide, or intent to -- or hopelessness, you know, things that
5 we think of being indicative of suicidal risk.

6 Nor -- the other thing is that the literature also
7 recognizes that there's a fairly substantial proportion of
8 people who suicide who have no psychiatric diagnosis,
9 whatsoever. Very interesting studies, I think, that were done
10 on that.

11 **THE COURT:** Okay. Thank you.

12 **BY MR. CUNNINGHAM:**

13 **Q** But that's suicide in general, not particularly suicide by
14 cop, is that right?

15 **A** Well, actually both. There is literature on both.

16 **Q** There is some?

17 **A** Yeah.

18 **Q** Of this type, not the spur of the moment time or something
19 else?

20 **A** In the report that that's looked alternate they didn't
21 differentiate between the different three categories.

22 **MR. CUNNINGHAM:** Judge, you know, I understand what
23 you said before, and I have was only exploring this in the sense
24 of this general principle of ambiguity, in other words,
25 alternative explanations, and alternative theory of the conduct.

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1 **THE COURT:** Yes that is why I let you go on at some
2 length in that respect. In other words I think the witness
3 acknowledges that for any one of the behaviors, one could argue
4 that there is another explanation.

5 **MR. CUNNINGHAM:** Uh-huh.

6 **THE COURT:** In fact, perhaps a number of different
7 explanations. But when you take the whole picture together is
8 what I understand she's saying, and you have these overlaps, and
9 then that gives rise to the conclusion that she is drawing, as
10 the most reasonable medical evaluation.

11 **MR. CUNNINGHAM:** And I suppose that what the Plaintiff
12 wants to do is counterpose a specific theory that accounts for
13 all the factors in a different way.

14 **THE COURT:** Yes. And in fact, there are two different
15 things that are going on here, and why this Witness's testimony
16 would be relevant at all, it's as -- it's relevant to explain
17 why someone may have behaved in the way that the officers say
18 the witness -- I'm sorry, the decedent did behave, as opposed to
19 the way that the witnesses on whom the Plaintiff relies say the
20 decedent behaved.

21 In other words, the theory is as follows, from the
22 Plaintiff's standpoint. The Plaintiff's witnesses testified
23 that the decedent consistently, in all respects, surrendered
24 throughout the encounter, someone over-reacted, and blew him
25 away in the course of his surrender.

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1 **MR. CUNNINGHAM:** Uh-huh.

2 **THE COURT:** The officers say there were all these
3 other behaviors.

4 The Plaintiff then argues, that is not believable,
5 what the officers say, because nobody would act that way. It's
6 not logical, it doesn't match up to any way that anybody would
7 ordinarily conduct their behavior and life.

8 **MR. CUNNINGHAM:** Uh-huh.

9 **THE COURT:** This theory is being offered not to
10 justify a shooting -- you can't shoot someone just because they
11 want you to. I mean, we know that. I mean, you can't say, "All
12 right, he wanted to be killed, and he is killed, and so that's
13 the end of the case." No. It's not being offered for that
14 purpose.

15 It is being offered to explain why someone may well
16 have acted in the way described by the police, under the
17 circumstances. And that's -- that's the reason this testimony's
18 being offered by the Defendant.

19 My question is whether or not there was sufficient
20 support for this opinion, both as a general matter and as a
21 specific matter as applied to this case, and whether this is an
22 opinion that would find support in the relevant psychiatric
23 community and expert community, and not simply an idiosyncratic,
24 essentially, assessment made by the one doctor that just did
25 not -- was kind of free-floating, away from the body of

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1 psychiatric literature and findings and testing, and that's why
2 we were here.

3 There is no question that the opinion, as almost any
4 expert opinion, can be cross-examined at the time of trial.

5 **MR. CUNNINGHAM:** Yes.

6 **THE COURT:** If it's admitted. And all manner of
7 questions asked about -- of the nature that you are asking as
8 well, and others, and then arguments made about why it's less
9 likely that it went down the way that the police said, and less
10 likely that this opinion should be accepted, and why it's more
11 likely that it happened just the way other people said it
12 happened.

13 **MR. CUNNINGHAM:** Uh-huh.

14 **THE COURT:** And that's what the trial would be about.

15 **MR. CUNNINGHAM:** But your -- the Court is more or less
16 in a 403 position here, right? In terms of whether or not to
17 allow this corroborating or purported corroborating evidence?

18 **THE COURT:** Well, there are two different questions.
19 One is, does the opinion meet the *Daubert* test. And that's why
20 I stopped you when I did, because it looked like at this point,
21 you were not focusing -- frankly neither was Mr. Wiener at the
22 beginning. That's why I just sort of stopped him. All right.
23 He was going to lay out the whole opinion in great detail, and
24 show how strongly the witness felt about it.

25 And that isn't really why I'm here. My task is to

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1 determine whether there are other people out there that might
2 legitimately hold this position, and take -- I'm sorry, take the
3 position and hold the opinion --

4 **MR. CUNNINGHAM:** Uh-huh

5 **THE COURT:** -- that this witness does in the relevant
6 psychiatric community. All right, that it's not just something
7 that she's coming up with that nobody else would legitimately
8 arrive at.

9 And, and that's really summarizing *Daubert* in a far
10 too simplistic way, and I would intend to make a better record
11 on that, if I do allow the testimony.

12 But, essentially, I'm just trying to explain the
13 difference between testing her opinion just as -- as -- as one
14 might do of any opinion that's offered, and testing it against
15 the *Daubert* standard.

16 **MR. CUNNINGHAM:** Uh-huh.

17 **THE COURT:** That's why I stopped Mr. Wiener and why I
18 stopped you where I did, after it appeared to me that we had
19 gone into her ability to explain to you why, even if there's an
20 ambiguity, it doesn't necessarily mean that the opinion cannot
21 be legitimately held.

22 And then, of course, you can argue whatever you wish.
23 If you have anything to show that the studies on which she
24 relied should be discredited, whether there's any reason to
25 suggest that there's a large body of people who don't accept the

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1 concept of suicide by cop, or the application of the factors on
2 which she has primarily relied in testing the behavior against a
3 reconstruction of suicide by cop, anything of that nature, I
4 don't want to take that away in any way from the inquiry.

5 What I don't want to do is just get into a -- what
6 I'll call traditional cross-examination of -- an opposing
7 party's said.

8 **MR. CUNNINGHAM:** All right, Judge. I've got to say, I
9 really haven't had the opportunity to make much of a study at
10 all.

11 **THE COURT:** I'm aware of that, although Mr. Galipo
12 could have and provided that to you, if that information exists
13 out in the world. I'm assuming if you don't put it in, it
14 doesn't.

15 **MR. CUNNINGHAM:** Let me ask the Doctor, since I'm
16 otherwise at a loss for any source --

17 **THE COURT:** I think you do pretty well.

18 **MR. CUNNINGHAM:** I take it she is principled enough to
19 tell us --

20 **THE WITNESS:** Yes.

21 **BY MR. CUNNINGHAM:**

22 **Q** The opposite side of the question here, that in terms of
23 reservations in the profession about this kind of evaluation of
24 situations like this, where -- and maybe you could help by
25 explaining -- I know you talked about, you know, the

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1 circumstances in which analysis of suicides are necessary, you
2 know, in other contexts, like the will and something like that.

3 But I'm a little at a loss to understand where a
4 suicide-by-cop analysis is relevant, except in the defense of a
5 lawsuit.

6 **A** Oh, no, that's not the case at all. In fact, the reason I
7 got interested in this area -- although I first learned about it
8 by being referred cases to try to figure out what was going on
9 with the decedent, although it wasn't for the purpose of
10 testifying -- you know, trial consultation. It was a city
11 attorney who cares about his citizens and his police department.

12 But, the primary reason I think people look at this is for
13 prevention.

14 **Q** Uh-huh, prevention --

15 **A** Of these incidents.

16 **Q** With patients? Or with cops?

17 **A** Both.

18 **Q** Uh-huh.

19 **A** You know, when I train law enforcement officers, I say to
20 them, "Look. Suicide by cop is not a law enforcement problem."
21 Which is, you know, a very inciteful thing. I-N-C-I-T-E-F-U-L.
22 They -- you know, they're like, "What do you mean?" You know.

23 **Q** Yes.

24 **A** But I say, "Look, by the time it gets to you, the failures
25 have occurred in several areas." Number one, somebody didn't

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1 recognize that the individual was suicidal, or if they had
2 mentioned that they were, you know, somebody didn't bring it to
3 clinical attention.

4 And if they did bring them to clinical attention, I -- I
5 will tell you something very interesting. And, this is one of
6 my missions in prevention. Clinicians do not routinely ask
7 suicidal patients if they are thinking about committing a
8 suicide by cop. I never did that until I started to work in
9 this area, despite working with a large number of patients who
10 are acutely suicidal.

11 I would say that -- "What is your plan for suicide?" And
12 then would say, "Gunshot." Or "I'm going to -- you know, I live
13 up in Sonoma County." The thing up there is to drive off
14 Highway 101 into Goat Rock. I mean, that's everybody's dream.

15 It was only until I said directly, "Have you ever thought
16 about a suicide by cop," that my patients who were thinking
17 about it said "Yes," even though I had asked them previously.

18 **Q** Uh-huh.

19 **A** You know, "What's your planned method of suicide?" Nobody
20 had disclosed that to me.

21 **Q** Had they told you something different?

22 **A** Yes, yes.

23 **Q** Or said they didn't --

24 **A** Yeah, yeah.

25 **Q** But then when you ask this, then they said, "Well, that's

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1 what I'm really thinking about"?

2 **A** Well, I'll tell you, it was like a heart-stopping moment,
3 because the very first time I ever -- you know, I decided after
4 I believed that suicide by cop really existed, you know, I had
5 to get convinced first, that would I then ask my suicidal
6 patients if they ever thought about it.

7 So, the first guy I asked says to me -- he looks -- he
8 looked shocked, first of all, as if I'm mind-reading, you know.
9 He says, "I have to tell you, not only am I planning for it, but
10 I'm actually practicing for it." Which, you know, that -- that
11 made my heart stop. Because I didn't know what to do, then.

12 **Q** Uh-huh.

13 **A** But, to get back to your question, no. I think for most of
14 us who work in this area -- you know, most of my time in law
15 enforcement-related issues is not spent on forensic cases, it's
16 spent on training, okay. Training both mental health clinicians
17 and law enforcement officers, to try to reduce this type of
18 event.

19 **Q** But, there, you are not trying to arrive at an opinion
20 that's going to stand up in a court of law, you are trying --
21 you have a possibility that you're dealing with, and a
22 phenomenon that clearly you have come to believe in, and you are
23 trying to train people, and get people, and counsel people --

24 **A** It starts with, actually, a higher threshold. Not what's
25 going to stand up in a court of law, but what's going to stand

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1 up in research, you know, because as I said, we have a tighter
2 definition for selection criteria than -- you know, than -- you
3 try to get to beyond a reasonable doubt.

4 And the reason is that -- what's the basis for training?
5 The basis for training either clinicians or law enforcement
6 officers is what we have learned from these events. So, we have
7 to be able to identify who is committing a suicide by cop, and
8 study them, before we can develop any training curricula.

9 **Q** Uh-huh. Okay. Are there -- have there been papers written
10 debunking the phenomenon, or qualifying it in such a way, that
11 you are aware of?

12 **A** No.

13 **Q** Okay.

14 **MR. CUNNINGHAM:** Let me just look here, Judge.

15 **THE COURT:** Sure. I thought you asked a lot of good
16 questions. I particularly liked your discussion about being
17 tautological.

18 **MR. CUNNINGHAM:** Uh-huh, thank you.

19 **THE COURT:** Both on the same page, on that one.

20 **BY MR. CUNNINGHAM:**

21 **Q** In terms of the -- I guess this really goes back to the
22 intent, and then to the connection between the element of intent
23 and that of a deliberate or purposeful escalation in the process
24 of the -- or in the course of an event, to try to, you know,
25 push the supposedly desired outcome, denouement.

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1 And you spoke also about -- I think that you said it's
2 common to detect that the subject is ambivalent, and I can
3 imagine that certainly make fundamental sense in a human way,
4 that you are still full of fear, you are still full of whatever
5 feelings brought you to suicidal ideation in the first place.
6 And so, there would be -- it wouldn't trouble you to -- in a
7 situation where you are concluding that suicide by cop occurred,
8 that there was also evidence that the person was ambivalent in
9 the course of the event about going through with it.

10 **A** Absolutely.

11 **Q** But what about a person who may have had it on his mind,
12 and then changes his mind completely? I mean, a person whose
13 ambivalence flees, and he's saying, "Don't shoot me, don't shoot
14 me"?

15 **A** Absolutely. We have cases of that. In the L.A. County
16 Sheriff's Office, the retired Commander is a guy named Barry
17 Perrou, who I train -- we do trainings together sometimes on
18 suicide by cop.

19 And, he commanded that unit for over ten years. So you can
20 imagine the number of this type of event that he responded to.
21 And some of them were able to end successfully, with the person
22 surrendering to the police.

23 **Q** Uh-huh. And in the studies or in the literature, are there
24 cases where, then, there's been a discussion with the person
25 where -- that didn't die, who breaks down the process he or she

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1 went through in changing their mind in what started out as an
2 event that might have gone that way?

3 **A** Yeah. Not -- not in the scientific literature, but there
4 are a couple of very famous people in our community, who
5 survived suicide-by-cop attempts, and who have been interviewed
6 and talk about their thinking and their reasoning, and that type
7 of thing.

8 **Q** Uh-huh. And, were those -- is it fair to say --

9 **A** I have to say that I actually have a patient that survived
10 an attempted suicide by cop as well, so I've talked to him.

11 **Q** And did he say, "I changed my mind, and I was intent on
12 trying to surrender at that point"?

13 **A** No. He didn't change his mind -- my guy didn't change his
14 mind. He got bean-bagged, and he was frail. He's an older man.
15 That knocked him out.

16 **Q** I see. So, he just didn't pull it off.

17 **A** Yeah. He didn't pull it -- he was intoxicated, frail, and
18 got bean-bagged, yeah.

19 **Q** I thought you had -- you had one person who was pissed off
20 afterwards, that they weren't -- that they hadn't succeeded.

21 **A** He was -- he'd be pissed off. He was pissed off, this man,
22 you know -- you know, if his cat looked at him, he was pissed
23 off.

24 **Q** All right. But in any event, there's certainly nothing in
25 the phenomenon and nothing in the study of it that would say

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1 that in a given case it isn't perfectly logical that a person
2 who may have been going in that direction and may have had that
3 kind of thing on his mind, or may have talked that way three
4 days before to other people, other cops, at this point, faced
5 with the cops, and they're pointing their gun, he says "No" --

6 **A** Right.

7 **Q** And then --

8 **THE COURT:** Mr. Cunningham, that's a great closing
9 argument.

10 **MR. CUNNINGHAM:** All right, Judge. I must be near my
11 close, then.

12 (Laughter)

13 **THE COURT:** That's a good point.

14 **THE WITNESS:** It was good.

15 **THE COURT:** The jurors can believe everything that
16 this witness says, right down to the last second, when he gets
17 blown away, has changed his mind, is fully surrendering, fine.
18 Just the way --

19 **THE WITNESS:** Yeah.

20 **THE COURT:** Okay. You can make your argument to the
21 jury.

22 **MR. CUNNINGHAM:** I suppose that would be what it would
23 come down to. I mean, I think in this context, Judge, of what
24 we are doing here today, the point for the Plaintiff's point of
25 view is that -- is that it's too uncertain.

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1 **THE COURT:** Yes.

2 **MR. CUNNINGHAM:** To meet the Kumho standard or the
3 standard or the Daubert/Kumho standard, in the sense that the
4 set of contrary possibilities that fits the profile of
5 surrender, at least from the crucial point on, from where the
6 cop still is -- you know, he's at the ready, but he's not called
7 upon to respond to a gesture or words or something that takes
8 him past the Shoot/Don't-Shoot point.

9 That it's -- at least in the facts of this case, as
10 you pointed out at the beginning, that you -- it's too hard to
11 apply a scientific standard or a quasi-scientific standard to
12 this set of facts, even based on the notion that there is -- and
13 apparently, and I don't really -- I don't see any basis for
14 contesting it, doesn't make any sense to try to contest a notion
15 that this is something that has come to the attention of the
16 profession, both professions, that they are concerned about it,
17 that certainly in the training and the prevention context, this
18 is certainly an important thing to deal with.

19 But there is a paucity of cases where the
20 determination has been made in a legal context. There are a set
21 of factors here, I called them elements, that I think it's fair
22 to say -- even though the Doctor was clear that, you know, the
23 standards for research study are more rigorous, perhaps, than
24 they might be here.

25 **THE COURT:** Uh-huh.

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1 **MR. CUNNINGHAM:** But still, that you would have to
2 have a profile of factors, you would have to have criteria that
3 would have to be met.

4 And if they are, in a given case, also subject to
5 alternative explanation that's coherent from one end to the
6 other, then it seems to me that disqualifies it. Or that raises
7 a question in the context of the *Daubert* principle, that would
8 have to give the Court pause before she would allow an expert.

9 And certainly, the Doctor is showing you that she is a
10 powerful expert, and would be a very persuasive witness. And
11 therefore, the 403 issue is really rife here.

12 And I understand that the Court apparently has gone
13 down that road with respect to some of the other evidence that
14 would apply in the context of trying to corroborate the
15 officers' version of what happened, and as against a character
16 evidence problem --

17 **THE COURT:** Yes.

18 **MR. CUNNINGHAM:** And in the context of that -- is it
19 the Palmquist case, the Seventh Circuit case?

20 **THE WITNESS:** Yes.

21 **THE COURT:** Yes. She says yes.

22 **MR. CUNNINGHAM:** And another case that I read or
23 looked at part of yesterday, the Sherrod (Phonetic) case?

24 **THE COURT:** The Palmquist, yes.

25 **MR. CUNNINGHAM:** Palmquist relied on Sherrod. And

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1 Sherrod said, you know, this is -- you're going too far away
2 from the objective test, when you let this kind of stuff in.

3 **THE COURT:** Okay. Well, let's do one thing at a time
4 here.

5 **MR. CUNNINGHAM:** Okay, yeah. I don't want to go too
6 far.

7 **THE COURT:** The first thing is -- the first thing I
8 want do is just deem the evidence submitted, at this point, on
9 the issue.

10 **MR. CUNNINGHAM:** Okay.

11 **THE COURT:** And allow the Doctor to step down, if she
12 would like to.

13 **THE WITNESS:** Thank you.

14 **MR. CUNNINGHAM:** Okay. I'll rest.

15 **THE COURT:** That's all right. I think we have
16 explored all of the relevant issues, so I'm going to allow her
17 to step down.

18 **MR. CUNNINGHAM:** Thank you, Doctor.

19 **THE COURT:** And then I'll take the argument on the
20 point, but we may as well let her step down.

21 She can either sit at Counsel table, or wherever
22 comfortable in the courtroom.

23 **THE WITNESS:** I'll sit with my students.

24 **THE COURT:** That's fine. Let's just wait for the
25 witness to step back, and give her a chance, and then I'll hear

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1 argument.

2 I think I understand your point, Mr. Cunningham.

3 **MR. CUNNINGHAM:** All right, Judge.

4 (Witness excused)

5 **THE COURT:** Okay, now, what we have here, then, as I
6 indicated, was the initial question of the meeting of the
7 *Daubert* standard.

8 Now, Mr. Cunningham has been brought into these
9 proceedings at the eleventh hour, and I think has made a number
10 of points that are very good and very interesting.

11 I do want to make it clear, though, because he was not
12 at all present during any of the other hearings that we had,
13 that the purpose of this hearing at the moment is not to discuss
14 the admissibility under 403, for example, or the admissibility
15 of the opinion or the admissibility -- of the opinion or the
16 admissibility of other evidence that could be brought in if this
17 opinion comes in, in -- and that 403 evaluation -- perhaps 403
18 as related to the *Daubert* test, all right.

19 But not the 403 in connection with other evidence that
20 may come in, if this -- if this theory is allowed to proceed.

21 **MR. CUNNINGHAM:** Uh-huh.

22 **THE COURT:** Okay. Because, I heard a number of
23 motions in limine about all manner of the evidence that does not
24 directly pertain to the shooting, itself, on the day in
25 question.

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1 **MR. CUNNINGHAM:** Yes.

2 **THE COURT:** And whether that should come in or not.

3 And, some of the rulings were dependent upon whether the Court
4 would allow the issue of suicide by cop to be raised in the
5 case.

6 **MR. CUNNINGHAM:** Uh-huh.

7 **THE COURT:** And, I don't want to really revisit those,
8 because I have made those rulings at some length, --

9 **MR. CUNNINGHAM:** I understand, Your Honor.

10 **THE COURT:** -- and in some detail. However, I want
11 you to know that the issue of 403 in connection with that
12 evidence was very carefully reviewed, and it's one of the
13 reasons that I am being so careful about whether or not to allow
14 this opinion.

15 Because, if it does come in, it brings in as
16 supporting evidence, a variety of behaviors. Now, some of those
17 behaviors may come in, anyway. In other words, we may have a
18 situation where the Plaintiff's argument in this case boils to
19 the following: Our witnesses are more believable that there was
20 a consistent set of behaviors evidencing surrender than the
21 back-and-forth kind of -- kind of ping-ponging back and forth
22 kind of behavior, surrender-not surrender behavior that is
23 described by the police.

24 Now, I had said to the Defendants earlier, why do we
25 need suicide by cop? You have the simple fact the person was

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1 under the influence of drugs, to a certain extent. Wouldn't
2 that explain erratic behavior?

3 You have, for example, erratic behavior surrounding
4 the event earlier. Perhaps that could simply come in to show
5 this is a person that isn't really acting logically at this
6 stage in his life, whatever's going on.

7 For all of those behaviors, the Plaintiff has various
8 explanations: The drugs really weren't of a level to cause
9 serious impediment; the other behavior itself shouldn't come in;
10 and it was too different than what we have here.

11 In other words, the union filing factor that the
12 defense ended up relying on very strongly was the issue of
13 suicide by cop, which has a -- if not a diagnosis, at least, I
14 think a matter of medical opinion to justify it, as opposed to
15 simply hypothesizing by the defense counsel, or the jury
16 speculating.

17 The argument as I understand it that you're making,
18 Mr. Cunningham, is that there are so many other explanations for
19 each of the behaviors in which Mr. Boyd either engaged
20 indisputably, or there's at least someone who says he engaged in
21 them. There's so many other explanations, that this really does
22 not hold up.

23 And, you know, you also had a question of the witness
24 about the tautology of the underpinnings. And that was
25 something that came to my mind earlier, and particularly wanted

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1 to explore with the witness in connection with the various types
2 of evidence that was relied upon in the Los Angeles Sheriff's
3 Office study, because at first it sounded to me like there was a
4 certain circular reasoning or bootstrapping here.

5 **MR. CUNNINGHAM:** Uh-huh, that's (Inaudible).

6 **THE COURT:** And that's why I spent a fair amount of
7 time questioning the witness about it. In response to the
8 question, is this too iffy, in other words, whether or not other
9 doctors relied on it, and if they rely on it for their medical
10 practice or otherwise, or in training police, is it too iffy?

11 Certainly I have thought about that, and it seems to
12 me, however, that the witness has said that yes, for any
13 individual behavior, there may be a variety of explanations.
14 For any individual behavior, there may be different
15 interpretations as to what the individual was even doing or --
16 or saying, as an objective matter.

17 Was the statement about "Kill me" made as a sincere
18 statement? Was it made sarcastically? Was it a challenge,
19 perhaps, to bait the officers into shooting him? There's a
20 variety of things that you could say.

21 But what the witness is saying is that if you take the
22 various standards that are required to be looked at, and you
23 apply them to the totality of the events here, that she can
24 arrive at an opinion to a reasonable degree of medical
25 certainty. And that's not an unreasonable opinion.

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1 And then, of course, the job of anyone who would hear
2 the opinion and it was used against them would be to pick it
3 apart, and perhaps show then the flaws in the opinion, or at
4 least room for discussion. But, in terms of it being just too
5 iffy in general, I would say no, that I think that it would pass
6 the test in that respect.

7 But then I still have to look at all of the *Daubert*
8 factors. And the first question is whether or not this is
9 scientific knowledge. Yes, it is, scientific it's coming from a
10 medical doctor with a very high level of training and experience
11 in the field that she is testifying about.

12 And two, will it assist the trier of fact to
13 understand or determine a fact in issue? Now, when you cited to
14 Palmquist, Mr. Cunningham, that case was decided on a different
15 issue.

16 What that case decided was that since the officer had
17 no knowledge of what this person wanted the officer to do, or
18 any idea that the person was operating under a state of mind of
19 suicide by cop, it could not have any bearing on the
20 reasonableness of that officer's testimony, because the
21 officer's reasonableness can only be based on what that officer
22 was aware of and knew.

23 Here, the idea of the person being a suicide,
24 essentially, is not offered as justification for anything the
25 officer did. It is offered as an explanation as to why the

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1 officer is telling the truth, as opposed to the witnesses who
2 testify contrary to the officer.

3 In other words, to explain why this very type of
4 scenario is likely to have been the product of a state of mind
5 on the part of the decedent to commit suicide, and to engage in
6 behavior that would carry it out in such a way that it would not
7 necessarily appear at first blush to be a suicide, and/or
8 because he was simply ambivalent at one point or another
9 throughout the encounter as to what he should do.

10 All right. As you point out, someone could start out
11 with a total plan to commit suicide by cop, and at the eleventh
12 hour just say, "Hey, I'm abandoning the plan, and I'm going to
13 surrender." And that would be your explanation to the jury as
14 to why the Plaintiff's witnesses are likely telling the truth,
15 even if the jury were to accept everything that the Doctor has
16 said. That's what trials are about.

17 But my job as a gatekeeper, as described in *Daubert*,
18 is to determine whether the jury should hear the testimony at
19 all. It was a case originally designed to weed out what is
20 commonly referred to as junk science, where jurors hear an
21 expert with credentials say anything at all, and because they're
22 credentialed, they're likely to accept it, simply by reason of
23 the person delivering the message. And, that the Court has an
24 obligation to see that that does not happen.

25 It is a ruling under Rule 104 of the Federal Rules of

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1 Evidence in that respect, to determine whether the matter should
2 be submitted to the jury, a foundational inquiry. I'm not
3 making a final test as to whether the opinion should be accepted
4 or not. That, of course, is for the trier of fact.

5 So, I will say the following. I started out rather
6 skeptical of this whole subject. And in particular, its
7 application to this case. Having heard Dr. Keram, however, I
8 have determined certain things from her testimony. One, I think
9 she is a principled witness. She is highly trained, and has the
10 expertise.

11 She does not appear to be favoring one side or the
12 other as a -- a manner that would color her opinion in any way.
13 I think that's evidenced by some of the things she said about
14 running her own cross-checks against the evidence on which she
15 was about to rely.

16 She has testified with respect to the factors that the
17 Court is required to look at. One of them is whether or not the
18 opinion can be tested. Well, it can't be tested in the sense of
19 running a scientific experiment. We know, however, that there
20 have been a number of studies conducted, and at least one very
21 large one.

22 There is also the question of whether or not the
23 theory has been subjected to peer review and publication. There
24 has been peer review and publication.

25 And the Court is to consider the known or potential

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1 rate of error. We didn't really get into how we would do that
2 in this kind of analysis, but the witness did say that in fact,
3 the selection criteria were designed to err on the fact -- on
4 the side of exclusion. In other words, there may be people who
5 were in fact committing suicide by cop who were excluded, in an
6 exercise of caution to make the bar relatively high.

7 It's the same as if one is running some type of a
8 medical examination and test where the test tends perhaps not to
9 pick up as many people as actually have the disease. So, here,
10 there may be people who have the disease, in a sense, and have
11 been excluded by the test. So, the standard is higher.

12 General acceptance, certainly there's been a number of
13 articles written, and also there have been discussions in
14 textbooks. According to the witness, there's been no one who
15 has debunked the theory, for example. And I think she would
16 tell you if there had been contrary articles or studies, because
17 I accept that she is answering the questions quite candidly, and
18 acknowledging some of the concerns that were raised by others
19 throughout the inquiry.

20 So, I do think that the criteria under *Daubert* have
21 been met, and that the opinion is an important one to the case.
22 Any time that an opinion is offered or evidence is admitted that
23 goes to support one party's case strongly, it will be
24 prejudicial, in effect, to the other side. So the question in a
25 prejudicial analysis is, is that prejudice unfair?

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1 **MR. CUNNINGHAM:** Uh-huh.

2 **THE COURT:** Is it unfairly prejudicial? And the
3 argument here by Mr. Cunningham is that there's so many
4 questions that could be raised with respect to the opinion, that
5 its probative value is outweighed by the prejudicial effect of
6 bringing in so much ability to consider what was in his mind and
7 also to bring in other evidence. But I have made that weighing
8 process as well, or engaged in it, and I do not think that the
9 balance tips in favor of being overly prejudicial in this
10 instance.

11 Again, as I have to say, that I did not come into this
12 inquiry with any conception as to whether the testimony would be
13 admitted or not. It's one of the reasons that I conducted the
14 inquiry here, and I -- I'm satisfied that the witness's
15 testimony does -- does pass muster under *Daubert*. So I will
16 overrule the objection to her being allowed to testify on the
17 subject. Okay.

18 Then, that leaves us with the -- whatever rulings I
19 made that were contingent on this finding. I think that those
20 are already in the Record. In other words, if I said it would
21 be admissible, if I allowed the *Daubert* -- under *Daubert* allowed
22 the opinion to be given, then I'm not going to go back and
23 revisit all those rulings.

24 So, I think that we have covered that. I also want to
25 say that even though Mr. Cunningham came in to this hearing,

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1 being asked to appear at the last minute, that he raised some
2 very good questions, and certainly his presentation in no way
3 suffered, in the Court's view, from the timing of his requested
4 appearance on the matter.

5 The witness has said there is no evidence out there or
6 opinions that would refute, if you will, --

7 **MR. CUNNINGHAM:** Uh-huh.

8 **THE COURT:** -- the studies that she has relied on. I
9 would assume that even though you were called into this hearing
10 late in the proceedings, Mr. Cunningham, that Counsel for the
11 Plaintiff, and in particular, Ms. Sarmiento and Mr. Galipo, who
12 have been with the case for a long time -- although
13 Ms. Sarmiento has now withdrawn as counsel, but they have known
14 about this issue for a long time.

15 **MR. CUNNINGHAM:** Yes, yes.

16 **THE COURT:** And Mr. Galipo has expressed the view that
17 this is a very serious blow to the Plaintiff's case, if this
18 evidence were to be admitted.

19 And I -- I cannot believe that if he held that view
20 for some time now, that he has not made an effort to inquire
21 into the evidence that would counter a finding under *Daubert*.
22 And I don't mean cross-examining in the fashion that we had some
23 of here today, and certainly would go on if the evidence is
24 admitted, but rather to show that the opinion doesn't meet the
25 *Daubert* standard, in that the scientific community does not

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1 accept either, in the general or the specific, one or the other.

2 So --

3 **MR. CUNNINGHAM:** I think that's fair, Your Honor,
4 under the circumstances. I don't know, nor have I -- I haven't
5 had the opportunity to discuss it with Mr. Galipo.

6 I take it that if -- you know, even at this late
7 stage, if some bombshell were found and brought to the attention
8 of the Court, that there would be a determination --

9 **THE COURT:** I would consider it.

10 **MR. CUNNINGHAM:** -- looked at again, of course.

11 **THE COURT:** I would consider it, assuming that it
12 wasn't available at the time that we had this lengthy hearing,
13 and if it were available, then I would have to determine whether
14 it was appropriate, nonetheless, to reconsider, in light of it.

15 But, again, if he had it, I believe that he would have
16 given it to you.

17 **MR. CUNNINGHAM:** (Inaudible) seen in the memorandum,
18 Your Honor.

19 **THE COURT:** I'm relying on that, as well. And the
20 witness's testimony on this point.

21 So, we have, though, some other things to take up.

22 And I don't know if you are in a position to address these.

23 But, one of them is the number of jurors, and the
24 challenges that we will have. We -- we touched upon this at the
25 last calling. And I think we agreed pretty much on -- nine?

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1 Was that it?

2 **MR. WIENER:** I believe so, Your Honor. I believe
3 Your Honor indicated --

4 **THE COURT:** Well, you know, we have the potential of a
5 four to six-week trial here.

6 **MR. CUNNINGHAM:** Uh-huh.

7 **THE COURT:** All right. There's also questions about
8 the length of the trial, and we will get to that in a minute.
9 But I wouldn't think that we would need more than nine jurors.
10 Six is the minimum, as you know.

11 **MR. CUNNINGHAM:** I've heard it said, Judge, actually
12 in the Oakland building, that they believe they lose one juror a
13 week. I don't know if that's been proven out or not.

14 **THE COURT:** Yeah, then we would have a huge jury. And
15 of course, you can't have more than 12. So --

16 **MR. WIENER:** Your Honor, I think we had requested more
17 than nine, and Your Honor had not agreed to that.

18 **THE COURT:** Well, I think nine, at least. For now,
19 I'm saying nine. We can -- we could make a last-minute
20 determination if we had to, but I would say nine.

21 And I would give the parties one extra challenge each,
22 so, four challenges per side. Ordinarily, you would only have
23 three.

24 **MR. CUNNINGHAM:** Uh-huh.

25 **THE COURT:** Okay. I do not have a usable statement of

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1 the case to be read to the jury for purposes of voir dire. Now,
2 by that, I don't mean that I want a long description of every
3 single issue in the matter.

4 What I'm trying to do is explain to the jury that this
5 isn't a contract case, it's not an auto accident, it's not
6 someone who didn't get paid or got fired from work. It is what
7 it is. And, something very generic. And I'm going to need that
8 statement no later than a week before.

9 Now, we're starting the trial on the 9th?

10 **MR. CUNNINGHAM:** Uh-huh.

11 **THE COURT:** All right. And I'm going to need that
12 statement no later than August 2. Now, let's see. 2 would be a
13 Thursday, I guess. I don't know. I don't have my calendar.

14 **MR. WIENER:** I think so, Your Honor.

15 **THE COURT:** That's correct? All right. If you are
16 absolutely unable to arrive at an agreed-upon brief statement
17 describing the case for the jury, then what I would like is your
18 respective submissions, and I will do something which would
19 probably be different than both of them, but who knows?

20 But mostly, I just want to tell them this case arises
21 from a shooting that resulted in the death of the person shot,
22 on X date, in San Francisco, by the Police Department. You
23 know, something of that nature.

24 And that the Plaintiff alleges that the police used
25 excessive force and unnecessary force in the shooting, and the

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1 Defendant denies that, and -- whatever else you want to say
2 about it, briefly.

3 In other words, we're not trying the case in the
4 statement. I just want them to know what kind of case it is,
5 very, very generally.

6 The other matter, then, -- oh, I do want to say in
7 connection with the time that was allotted, at the last calling,
8 I suggested to the parties a time of -- time limits of 40 hours
9 each. The Defendant went back and decided that they couldn't
10 live with 40 hours on their side. The Plaintiff does not
11 disagree with the 40 hours.

12 Forty hours would result in about a four-week trial,
13 exclusive of closing arguments, voir dire, deliberations and
14 what have you.

15 What the defense has done is written me a letter. I'm
16 going to say this once, and then I don't really want to say it
17 again. Don't send me letters. Okay. If you have a point to
18 make, put it in some type of filed document other than a letter.

19 I have considered this, in the interest of time. I'm
20 not going to, in the future. So, if you have something that you
21 wanted to have the Court read, then you can call it "Defendant's
22 Request for Additional Time," and file it, all right, as a legal
23 document. But not a letter, because I don't rule on letters.

24 Now, in this instance, what the Plaintiff has done is
25 endeavored to figure out how many witnesses they're going to

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1 need. Part of their need for witnesses they attribute -- I'm
2 sorry, the Defendant -- that they attribute to the Plaintiff's
3 lack of cooperation in stipulating to certain facts that they
4 believe are irrefutable.

5 I don't know if that's true or not. And I might ask
6 for some examples of that from Defendant's Counsel, now.

7 Mr. Loeb's?

8 **MR. LOEB'S:** Yeah. In fact, Your Honor, June 21st, we
9 sent a letter to Plaintiff's counsel, listing a number of
10 issues, and in which we requested a stipulation about facts,
11 foundational issues. And we've received no response.

12 In fact, it's been very difficult on our part to get
13 any response from Plaintiffs on a number of issues. I know
14 Mr. Galipo was very busy, but it's -- unless he's here and we're
15 talking with him, it's very difficult to get any type of a
16 response.

17 **THE COURT:** Give me an idea of some examples of issues
18 that you hope to shorten up the presentation on, by getting some
19 kind of an agreement or stipulation.

20 **MR. LOEB'S:** The authenticity of the bullet found in
21 Mr. Boyd's left hand.

22 **THE COURT:** Now, authenticity?

23 **MR. LOEB'S:** That that bullet that was examined by the
24 experts was the bullet that was found in his left hand at the
25 autopsy.

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1 **THE COURT:** You were talking about, essentially, a
2 chain-of-custody issue, perhaps. In other words, that the
3 bullet that ended up being tested is the bullet that was found
4 in his hand.

5 **MR. LOEBS:** Yes, Your Honor.

6 **THE COURT:** You know, without calling the witness who
7 took it out of his -- saw it in his hand, took it out of his
8 hand, put it in an envelope, and delivered it somewhere.

9 How many extra witnesses will you have, if there is no
10 stipulation to that extent, do you think? I mean, how much are
11 you saving, in terms of witnesses?

12 **MR. LOEBS:** I think in terms of overall witnesses that
13 would testify related to the preservation and the chain of
14 custody of evidence, we listed that there were be eight
15 witnesses that would be doing that.

16 **THE COURT:** On all issues.

17 **MR. LOEBS:** On all issues. So this was just one
18 issue, that would be one witness who would be testifying about
19 that. But if we had to go through the bullets, the clothes, the
20 shell casing, the fibers, the DNA, the weapons, there would be
21 eight different individuals who would be needed for the
22 foundation of the chain of custody, just for those issues.

23 And that was part of our letter to Plaintiff's
24 Counsel, June 21st, asking for -- if we could have stipulations
25 as to those matters, and evaluating how long it would take to

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1 put on the evidence.

2 **THE COURT:** I can't recall if there's any real issue
3 as to contamination of evidence in this matter. Mr. Cunningham
4 doesn't know. But, would you please convey the Court's desire
5 to have some response given to Counsel for Defendant.

6 And, I can put a time limit on that, for Plaintiff to
7 get back to the Defendant on this matter, because they do have
8 to line up witnesses and determine whether they need them or
9 not. And I don't know that the Plaintiff has submitted any
10 similar requests or inquiries to Defendant.

11 Mr. Loeb says no.

12 **MR. CUNNINGHAM:** I don't know that, either. And I
13 don't know when Mr. Galipo's trial is expected to be over.

14 I do want to understand, in this context, that we are
15 talking about chain of custody and authentication of the items
16 of evidence, as opposed to other matters like was this the
17 bullet that came out of the leg into the hand (Indicating).

18 That's still subject to --

19 **THE COURT:** Yes. Trajectory, he's not talking about
20 here.

21 **MR. CUNNINGHAM:** Okay.

22 **THE COURT:** He's talking about, as I understand it --
23 well, if there is an issue about -- how many bullets were
24 recovered from --

25 **MR. LOEBS:** There were two bullets recovered from

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1 Mr. Boyd's body.

2 **THE COURT:** One is recovered from what?

3 **MR. LOEBS:** The left hand. And the other was
4 recovered from inside his body (Indicating).

5 **THE COURT:** Okay. I do not know whether there is a --
6 a legitimate dispute as to whether a bullet that the police have
7 marked and put in an envelope or something, saying it came out
8 of the chest or abdomen, isn't actually the one that came out of
9 there, and maybe it came out of somewhere else. I don't know.

10 **MR. CUNNINGHAM:** Uh-huh.

11 **THE COURT:** And if there is a legitimate concern, then
12 I think that you -- you know, may not want to stipulate.

13 But to the extent that there is no real issue on the
14 point, then you might want to agree that the testimony from the
15 analyst, who does whatever testing he or she did, could be given
16 without the need to track the exhibit from Point A to Point B,
17 just in the interest of everyone's time, and --

18 **MR. CUNNINGHAM:** Okay, Judge. I'm sure that Mr. Loeb's
19 and I -- that the parties -- and I'll try to help this process
20 as much as I can, coming in at this stage, to get what's sort of
21 able to be stipulated to, done.

22 **THE COURT:** Okay.

23 **MR. CUNNINGHAM:** And make clear what, you know, the
24 bases for not stipulating, if that's the problem.

25 **THE COURT:** All right. So, that was one thing.

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1 **MR. LOEBS:** Yes.

2 **THE COURT:** The other was -- are there any other
3 categories of stipulation, other than -- chain of custody is
4 what I'm calling it.

5 **MR. LOEBS:** I do have a letter to the Plaintiff's
6 Counsel, where I list out each one of those items that we
7 request stipulation --

8 **THE COURT:** Yeah, but other than that concept of
9 keeping track of what went from where to where, do you have any
10 other types of foundational stipulations, or otherwise?

11 **MR. LOEBS:** The photographs of the scene, authenticity
12 of the photographs of the scene, that they are of the scene.
13 The photographs taken of the vehicle. The audio tape of the CAD
14 dispatch. That is, the audio tape of this event.

15 A number of interviews were done through the OCC and
16 by the DA, that we wouldn't need to call the foundational people
17 to establish that that's what they are, that they are interview
18 tapes that we could use --

19 **THE COURT:** Now, wait a minute. Tapes of interviews,
20 this would be for what? Impeachment?

21 **MR. LOEBS:** Impeachment of a witness. If we needed to
22 -- if they said something, and then we have the DA interview
23 tape of the witness -- not that it's admissible, but that it is
24 what it purports to be. And that is the interview that was done
25 of that witness on a certain date.

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1 So, that's why I refer to these as authenticity.

2 **THE COURT:** Well, if you were -- let's say you had a
3 witness on the stand, and they said X. And you've got them on
4 tape, saying Y.

5 All right. Were you planning then to just -- you
6 know, you can play a piece of the tape, and say to the witness,
7 "Isn't that you? Isn't that what you said?" You know.

8 So, I don't know if you need anybody else coming in or
9 not. But --

10 **MR. LOEBS:** Unless they say it's not.

11 **THE COURT:** Well, if they say it's not, then you --
12 maybe they don't want to stipulate it is. Yeah. I don't know.
13 But that's something that, I guess, you could talk to them
14 about.

15 And the other, the photographs, ordinarily were you
16 planning on just lobbing these photographs into evidence? Or
17 were you going to have a witness on the stand, asking them about
18 them?

19 **MR. LOEBS:** Well, they're used for a variety of things
20 with different witnesses. Sometimes they're used for the
21 experts' evaluation.

22 **THE COURT:** I see.

23 **MR. LOEBS:** What we were hoping to avoid is having to
24 call a witness to lay a foundation for the photographs,
25 themselves. Because there's no dispute, I don't think, that

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1 these are photographs that were taken of the scene or of the
2 vehicle.

3 I just wanted to not have to trouble the Court with
4 those type of foundational witnesses.

5 **THE COURT:** To lay a foundation for a photograph, it
6 is not my understanding that you have to call the photographer.
7 All right.

8 In other words, if a witness says, "This accurately
9 depicts what" -- whatever it is that you want to ask them about,
10 that's okay. You don't have to have a photographer saying "Yes,
11 I was there, taking the picture."

12 In the same light, if you're going to use a photograph
13 with an expert who wasn't there, and is asked to assume this is
14 the position of something, then you might need a stipulation,
15 because you wouldn't have anyone who would be in a position to
16 say whether that correctly reflects something or not.

17 **MR. LOEBS:** And, Your Honor, that's the primary use
18 that the Defendants seek for the photographic evidence.

19 **THE COURT:** Okay. Then, maybe you want to explain to
20 them, the Plaintiff's Counsel, who took it. And if they have
21 certain disagreements about either the timing of the photographs
22 or otherwise, it may be that they want to dispute it. I don't
23 know.

24 **MR. CUNNINGHAM:** I don't know, either.

25 **THE COURT:** And, you know -- okay. It's not quite the

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1 same as just calling or not calling the custodian of records
2 from, you know, San Francisco General Hospital, or something
3 like that. Okay.

4 Then what we have here is a long list of witnesses,
5 that totalled up to something like 53 witnesses, many of whom
6 are experts. And, the Defendants are requesting at least 70
7 hours, which is almost twice what the Court had proposed.

8 Now, it does seem to me there's got to be some way
9 that some of these things can be shortened up a bit. For every
10 one of these Oakland car chases -- and I grant that there were
11 three -- is it that one patrolman from each of those cars can't
12 say what happened? You need both of them from each of those
13 events?

14 **MR. LOEBS:** If -- referring to the essentially two
15 Oakland incidents that happened in 2004, that's what you're
16 referring to, where we list five witnesses related to those two
17 different incidents, I think Mr. Wiener can speak directly to
18 the witnesses. It would be necessary to talk about the
19 different events that are relevant that occurred.

20 And, we did our best to make this as narrow as we
21 could, about -- one witness about the criminal history, and
22 there are five witnesses that we designated for that issue.

23 But Mr. Wiener gave this a lot of thought, and he
24 could address the Court as to why they would be necessary, on
25 the two different -- because there are two incidents in Oakland,

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1 close in time.

2 **THE COURT:** I might be willing to give you some
3 additional time. For example, in the sense of this expert
4 witness that we had on the stand.

5 Given that she's going to be allowed to testify, she's
6 going to be a relatively lengthy witness, to lay a foundation as
7 to what her expertise is, what her opinion is based on,
8 et cetera, et cetera.

9 And she was on the stand on what I'll call -- what
10 could have been either the equivalent of a regular direct or an
11 abbreviated direct, it was hard to tell, because we -- I wasn't
12 asking her the questions that you necessarily would be asking
13 her in the trial.

14 But, it took about two hours to do that, for just the
15 initial inquiry, from about -- a little after 9:00 to a little
16 after -- well, no, it was actually less than that.

17 **MR. WIENER:** Two and a half hours.

18 **THE COURT:** No, I don't -- how long?

19 **MR. WIENER:** I think it was more like two and a half
20 hours, Your Honor.

21 **THE COURT:** Two and a half? Hmmm. We started at
22 about 9:10 or so with her. And we took a break before 11:00,
23 didn't we?

24 **MR. CUNNINGHAM:** It was just before 11:00.

25 **THE COURT:** Yeah, so it was actually a little less

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1 than two hours. But, it took a fair amount of time. And then,
2 of course, there would be cross, and then there would be
3 redirect. And so, you know, you could say that that witness
4 could take up a fairly decent chunk of time.

5 But, 40 hours is a lot of time. And so, many of these
6 witnesses, it seems to me, would be reasonably brief. Okay. We
7 have the rap lyrics stop, and I wasn't quite sure, for example,
8 why you needed two witnesses on the rap lyrics stop.

9 **MR. LOEBS:** Mr. Wiener --

10 **MR. WIENER:** Your Honor, that's because one of the
11 officers actually found the lyrics and the paper, and then
12 provided them to the other officer, who then spoke to Mr. Boyd
13 about it.

14 **THE COURT:** Okay. So, but it's fairly short. In
15 other words, a fairly short encounter. By the way, it's
16 objected to, but I overruled that objection, Mr. Cunningham.

17 But, it's essentially going to be that he was stopped,
18 and that -- it doesn't require a lot to say whatever was the
19 reason they pulled him over. And in searching the car, they saw
20 in plain view or whatever it was, they say they see this thing,
21 one of them gets it, gives it to the other one, the other one
22 talks to him about it. It doesn't take more than probably five
23 minutes for each witness on direct. It doesn't seem like it
24 would take a lot of time.

25 Other witnesses may take longer to describe an event,

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1 such as Ms. Hogan or Ms. Williams, but again, it's relatively
2 straightforward.

3 Now you have a lot of witnesses out of Larch Way, six
4 witnesses. You have some question about the collection of
5 exhibits and that, chain of custody. Although, all of those can
6 be laid pretty quickly in terms of what the witness would say.
7 The -- the one incident where he is ultimately stopped in
8 Oakland would take more time to describe.

9 **MR. LOEBS:** The May 3rd incident. Or. May 2nd
10 incident.

11 **THE COURT:** Whichever one in which he, ostensibly,
12 gets on the ground without help, challenges them to kill him, or
13 shoot him, et cetera.

14 The experts could take some amount of time here,
15 trajectory analysis and --

16 **MR. LOEBS:** If I may, Your Honor.

17 **THE COURT:** -- things of that nature.

18 **MR. LOEBS:** Because there weren't motions with respect
19 to the Defendant's experts on some of these issues, I don't know
20 if we really apprised the Court as to the sophistication or the
21 complexity of something else that's contained in the testimony
22 of these experts.

23 **THE COURT:** Uh-huh.

24 **MR. LOEBS:** For example, I know the deposition
25 testimony isn't necessarily a guide, but with the testimony of

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1 Alexander Jason, he went on for two days just in explaining his
2 opinions, because he does an evaluation of the bullets fired,
3 Mr. Boyd's positioning --

4 **THE COURT:** At a deposition, though.

5 **MR. LOEBS:** Yeah. And he will do that at trial, as
6 well.

7 **THE COURT:** But that will be on your tab, however.

8 **MR. LOEBS:** Yes. I understand that. But, it's a
9 very -- there is an awful lot of information that has been
10 considered and evaluated by the experts in case.

11 And he would --

12 **THE COURT:** How long --

13 **MR. LOEBS:** How long would that -- I think that would
14 be most of the day.

15 **THE COURT:** You are saying that the trajectory witness
16 would last most of the day. And if the day were five hours,
17 just to say that, you would say that he would be on the stand
18 for five hours? Or he would be on direct and redirect for five
19 hours.

20 **MR. LOEBS:** I think, altogether.

21 **THE COURT:** Altogether. All right. That witness
22 might be similar to Dr. Keram in length, then.

23 **MR. LOEBS:** I believe so.

24 **THE COURT:** Okay. Some of the others might well just
25 be an hour on your examination of them. You say you have 14 of

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1 these witnesses, I think, experts?

2 **MR. LOEBS:** Yes.

3 **THE COURT:** Okay.

4 **MR. LOEBS:** The other of the experts that would take
5 more time, Your Honor, would be, I believe, the fiber analysis
6 expert. Ironing that would be closer to three hours. Assuming
7 that --

8 **THE COURT:** Just to give their opinion?

9 **MR. LOEBS:** Well, it depends -- it may be briefer.
10 I'm not sure what the Plaintiffs are intending to do with
11 cross-examination.

12 **THE COURT:** I think your examination -- I was going to
13 say, your examination should be relative straightforward. You
14 got the thing from whoever obtained it, you did whatever test
15 you did. Oh, well, you have to ask them their expertise and
16 qualifications, and that could take, you know, a while. Then
17 they got it, they ran their test, and they arrived at an
18 opinion.

19 Now you're going to get an hour's worth of
20 cross-examination about why it is a bad opinion. And then you
21 come back, and you do whatever you're going to do with it. But
22 it shouldn't be too, too long.

23 I'll tell you what I would be willing to do, and I
24 really question the wisdom of this, but I would be willing to
25 give you ten more hours. But that's it. And it goes for both

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1 sides, you know. Because if these witnesses are going to be
2 giving particularly sophisticated and lengthy testimony, then it
3 is fair that the Plaintiff would need time to conduct meaningful
4 cross on that, if they want. Maybe they just want to leave it
5 alone. But, that's for both sides.

6 But, I'm not going to do more than that, and I think I
7 probably shouldn't even give you that, but I'm going to give it
8 to you, because -- partly because how long Dr. Keram took. And
9 seeing that an expert can, you know, on an issue like this, eat
10 up a fair amount of time.

11 But, now, if it turns out that as we go through this,
12 you are moving apace, in a reasonable fashion, and you still
13 can't do it, and you have only called the very necessary
14 witnesses, and not larded on a bunch of expert people, you know,
15 you can make some heartfelt plea, but I wouldn't rely on it
16 getting granted. So, you've got to do your best.

17 **MR. WIENER:** And Your Honor, the 50 hours, does that
18 include opening and closing?

19 **THE COURT:** It would include opening. It would
20 include opening.

21 **MR. WIENER:** But not closing?

22 **THE COURT:** But not closing. Okay. And I recognize
23 that the -- frankly, the -- oftentimes the Plaintiff has the
24 laboring oar in laying out the most facts in an opening
25 statement.

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1 In this case, they may leave a lot of things out, or
2 they may try and counter them in the opening statement. If they
3 leave them out, you are going to be left with picking up the oar
4 at that point, and putting in additional facts.

5 But if I'm just outright wrong in this, I'll concede
6 that at such a time as it is apparent to me. I could be wrong
7 and it will never be apparent to me.

8 But in any event, you shouldn't count on extra hours,
9 keeping in mind that you are getting a much, much longer chunk
10 of hours than the ordinary case gets. And as you say, this is
11 not an ordinary case. But, nonetheless.

12 So we have now upped those hours by a quarter, to 50.
13 Okay.

14 **MR. LOEBS:** Your Honor, --

15 **THE COURT:** Yeah.

16 **MR. LOEBS:** Assuming there's some level of cooperation
17 with some of the foundational witnesses, is that assumed in the
18 50 hours?

19 **THE COURT:** Pardon?

20 **MR. LOEBS:** Is there an assumption of within the 50
21 hours there would be some level of cooperation with the
22 Plaintiffs --

23 **THE COURT:** Not particularly, because I'm assuming
24 that the foundation would be pretty straightforward, and
25 wouldn't take a lot of time to lay. And so, I mean, I don't

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1 know -- how many people did they -- they ship these things
2 through? Do you know? Whether there's any

3 **MR. WIENER:** Well, there's just a lot of different
4 pieces of evidence that --

5 **THE COURT:** Yes, but each one could be pretty quick.

6 **MR. LOEBS:** Well, this case did go through a number of
7 hands. And it would just -- just takes some time to put one --
8 -- one witness on the stand. I couldn't imagine a five-minute
9 testimony, that it just takes some time just to call the witness
10 and present their testimony.

11 **THE COURT:** Well, you know, if you can -- when the
12 witness is called, if you -- first of all, you can find out if
13 the Plaintiff is going to stipulate. If the Plaintiff doesn't
14 stipulate, then you can begin your examination and suggest that
15 you are now asking whether they are willing to stipulate to the
16 chain of custody, or -- well, no you can't really ask them that,
17 that's not fair. I guess --

18 **MR. LOEBS:** I wrote that down, too.

19 **THE COURT:** No, you won't be able to do that. I guess
20 you are just going to have to proceed then to lay it and do the
21 best you can with that.

22 I will say that the Plaintiff has gotten a real
23 advantage out of having this *Daubert* hearing, because the things
24 that this witness has testified to, that have been really very
25 supportive of both her integrity as a scientist and as -- I

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1 suppose, the thoroughness with which she approached her task, if
2 they had been asked in the first instance in front of the jury
3 by the Plaintiff all of these things that will be coming out on
4 cross-examination, the Defendant can still bring them up on
5 direct but they won't have as much force and effect as if they
6 came out on cross as they did in this hearing, which the
7 Plaintiff is now not going to ask those questions on
8 cross-examination.

9 So, they did get a benefit of that, and as a trial
10 tactic, it wasn't initially intended by the Court that that
11 happen, but I think, the side effect of what happened here.

12 So anyway, I don't know that we can do too much more
13 in this session. If there is anything else that you need to ask
14 me about, ask now because we have been here a long time, and I
15 want to avoid a break if we can avoid it.

16 **MR. WIENER:** Your Honor so is the record is clear we
17 do not agree, we object to 50 hours if that is wasn't apparent
18 before.

19 **THE COURT:** Yes. Well, I heard that, and yes -- you
20 don't want me to go back to 40. You are objecting to the 50
21 versus 70, right?

22 **MR. LOEBS:** Yes, Your Honor.

23 **THE COURT:** Okay.

24 **MR. LOEBS:** And if I could just say one thing, just so
25 the Record is clear, that one of the other facts that will take

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1 a lot of time in the defense's presentation of this case is that
2 the five individual officers that all used to be Defendants are
3 all involved in this incident, from beginning to end. And, that
4 will be -- it'll take a while for their testimony.

5 **THE COURT:** Well, that's if you want to ask them every
6 question, from beginning to end, and end up with all the
7 inconsistencies that that can't help but produce.

8 And, it seems to me that to the extent that anybody
9 has essentially different information, it's good to get that
10 out. To the extent that they are just along for the ride on
11 something that somebody else said, you may or may not want to
12 ask them about it. That's up to you.

13 Okay. Anyway, I think that's probably all that we are
14 going to do this morning. It's been quite a bit, actually.

15 And, I do thank Mr. Cunningham for coming in and
16 appearing.

17 **MR. CUNNINGHAM:** Thank you, Judge.

18 **THE COURT:** And carrying forward.

19 **MR. CUNNINGHAM:** Sorry I wasn't able to sell you on my
20 point of view, but I agree with the Court that the hearing was
21 valuable for both sides.

22 **THE COURT:** All right. Thank you.

23 **MR. CUNNINGHAM:** And I will report --

24 **THE COURT:** Okay. I doubt very much, by the way, that
25 this ruling has any bearing on your ability to try and arrive at

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1 some resolution of the case without a full-bore trial, because
2 after I made all my other rulings, it didn't have any effect.

3 If you thought that it would have any effect, I would
4 ask that you go back to Judge James, and I would ask her to try
5 and find time for you.

6 **MR. CUNNINGHAM:** Judge, I'll do my best to facilitate
7 all of the processes of communication that are necessary between
8 the sides, between now and trial time. And, certainly not
9 excluding that possibility.

10 **THE COURT:** All right. I would just say, if it has
11 any bearing on the discussion, then I would encourage you to
12 contact Judge James. I don't want to waste her time. She's
13 very busy.

14 **MR. CUNNINGHAM:** Yes.

15 **THE COURT:** So, I don't know if you have any thoughts
16 on this, Mr. Wiener or Mr. Loeb.

17 **MR. WIENER:** No, Your Honor.

18 **THE COURT:** Okay. I take that as it probably won't be
19 anything other than a waste of her time.

20 **MR. CUNNINGHAM:** I agree.

21 **THE COURT:** But, I would still ask you, before you
22 leave today, to just briefly touch base about what you are or
23 are not going to do in that respect. Okay.

24 **MR. CUNNINGHAM:** Okay.

25 **THE COURT:** So that, then, would conclude this session

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1 at this time.

2 **MR. CUNNINGHAM:** Thank you, Your Honor.

3 **MR. LOEBS:** Thank you, Your Honor.

4 **THE CLERK:** Court is in recess.

5 (Conclusion of Proceedings)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 04-5459 MMC, Marylon Boyd, et al. v. City and County of San Francisco, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

_____/s/ Belle Ball_____

Belle Ball, CSR 8785, RMR, CRR

Wednesday, October 1, 2008